The ANTITRUST BULLETIN

In This Issue

Symposium

ANTITRUST SECTION
ILLINOIS STATE BAR ASSOCIATION

"The Impact of the Cellophane Case on Section 2 of the Sherman Act and Section 7 of the Clayton Act."

- **Victor R. Hansen**
- **Gerhard A. Gesell**
- **John T. Chadwell**
- **George W. Stocking**

FEDERAL LEGAL PUBLICATIONS, INC.

VOL. II, No. 7
MARCH, 1957

ANTITRUST BULLETIN

Vol. II
No. 7
March
1957

The ANTITRUST BULLETIN

Table of Contents

Symposium

ANTITRUST SECTION ILLINOIS STATE BAR ASSOCIATION

"The Impact of the Cellophane Case on Section 2 of the Sherman Act and Section 7 of the Clayton Act."

Published by Federal Legal Publications, Inc., 18 Rose Street, New York 38, N. Y. Issued monthly, except July and August. **Subscription price $17.50 for ten issues. Per copy: $2.00.**

PRINTED IN THE UNITED STATES
BY
RECORD PRESS, INC.
NEW YORK CITY

SYMPOSIUM
ANTITRUST SECTION, ILLINOIS STATE BAR ASSOCIATION*

THE IMPACT OF THE CELLOPHANE CASE ON SECTION 2 OF THE SHERMAN ACT AND SECTION 7 OF THE CLAYTON ACT

The Section on Antitrust Law of the Illinois State Bar Association at its annual symposium held on November 29, 1956, presented a program designed to explore in some depth and from a number of points of view the impact of the decision of the Supreme Court in *U.S.* v. *E. I. DuPont de Nemours & Co.,* 351 U.S. 377, June 11, 1956, on the development of the law under Section 2 of the Sherman Act and Section 7 of the Clayton Act.

The Section was honored to have the Honorable Victor R. Hansen, Assistant Attorney General in charge of the Antitrust Division, as its guest at a reception and dinner following the symposium. Judge Hansen commented on the *Cellophane* case and the current activities of the Antitrust Division.

For many years the question of the proper definition of the relevant competitive market in antitrust actions has been debated but very little light has been thrown on the question by the opinions in reported cases. In the *Cellophane* case the problem of the proper market from the point of view of products was thoroughly explored. Outstanding work was done by defense counsel in preparing and presenting the pertinent facts on this issue. The question was carefully briefed and argued by counsel on both sides in the trial court and before the Supreme Court. Chief defense counsel for DuPont Company was Gerhard Gesell of Covington & Burling, who had final responsibility for the preparation and introduction of evidence and the argument of the factual and legal issues in both courts.

During the course of this litigation and following, economists have commented pro and con on the economic issues involved. One of the most prominent of the commentators was Professor George Stocking of Vanderbilt University who was cited in both the majority and minority opinions of the Supreme Court.

---

* Held in Chicago, Illinois, November 29, 1956.

In order properly to appraise the *Cellophane* case and to place the market area discussion in its appropriate doctrinal frame of reference, the Section called upon John Chadwell of Snyder, Chadwell, Fagerburg & Keck of Chicago, whose name is well known to the antitrust bar. He has for many years been an active and successful practitioner in the antitrust field and has written and commented on the basic problems of monopolies and mergers under Sections 2 and 7.

The Antitrust Section was indeed fortunate to be able to have these three outstanding men discuss the subject at its meeting on November 29, 1956. We wish to express our thanks to the editor of the Antitrust Bulletin for making it possible to bring these three papers to the attention of a wider audience.

DAVID M. GOODER, *Chairman*

J. R. BLOMQUIST
THEODORE R. GROENKE
EARL A. KINKINSON
THOMAS C. MCCONNELL
THOMAS E. SUNDERLAND
PHILIP W. TONE

The Executive Committee
Section on Antitrust Law
Illinois State Bar Association

CURRENT PROBLEMS AND POLICIES OF THE ANTITRUST DIVISION

by

VICTOR R. HANSEN*

It is a pleasure to be with you this evening. Tonight makes the first occasion I have had to meet many of you. Of course, I am honored and grateful for this gathering.

Tonight marks exactly four and one-half months since I became head of the Department of Justice's Antitrust Division. Before that, as some of you know, I served for some years as judge of the Superior Court of California in Los Angeles. And on that Court, I had spent a good deal of time sitting in its Probate Department.

Probate work, let me assure you, was not without its titillations. I recall one instance, for example, of a will written upon the torn piece of a starched petticoat of a nurse. I had no sooner recovered from speculations about that improbable occurrence, when I was faced with another will—this time written on the under side of the wooden rung of a ladder. And so you see the life of a probate judge is not as dull as some would think.

But, quite frankly, my excitement is of a different sort now. Since coming to Washington, most striking has been the almost infinite variety of antitrust. Antitrust, you all realize, covers the entire range of American life. Thus, this Administration has brought suits against lead producers,[1] shipping companies and airlines,[2] shrimp dealers,[3] trailer operators,[4] and linen service suppliers.[5] Treating

---

* Assistant Attorney General in charge of the Antitrust Division.

[1] *U.S.* v. *American Smelting and Refining Co., et al.*, Civ. 88-249, filed Oct. 9, 1953.

[2] *U.S.* v. *Pan American World Airways, Inc., et al.*, Civ. 90-259, filed Jan. 11, 1954.

[3] *U.S.* v. *Gulf Coast Shrimpers and Oystermans Association, et al.*, Cr. 7192, filed April 1, 1953.

[4] *U.S.* v. *Nationwide Trailer Rental System, Inc., et al.*, Civ. W-655, filed Aug. 28, 1953.

[5] *U.S.* v. *National Linen Service Corp., et al.*, Cr. 20559, Civ. 5171, both cases filed April 25, 1955.

even more directly those human frailties to which all of us may be subject antitrust has moved against restraints on the manufacture of eyeglasses,[6] false teeth,[7] and vitamin pills.[8] Just to ensure continued need for such pills, we have attacked restrictions on the sale of alcoholic beverages in the states that range from Maryland to Tennessee. And riding even higher on the wave of the future, we have more recently struck at limitations on production of sex hormones.

Antitrust, I might add, is concerned not only with the material things of life. It covers the theatre and arts as well. Thus, we have proceeded against restraints by the New York City Theatre Scenery Haulers[9] as well as the International Boxing Club.[10] And blending theatre with sport, as well as with a sense of humor, we have attacked restraints on commercial wrestling. As you can readily see, antitrust is no esoteric endeavor conducted by bureaucrats in Washington and eternally removed from the main stream of American living.

Of the broad panorama of antitrust, I have selected tonight but a few thin slices. My plan is, building on your discussion this afternoon, to offer a few thoughts on *Cellophane*. Beyond that I shall talk over ideas for legislative changes in the antitrust field the Justice Department is now considering.

First, *Cellophane*. The *du Pont* cellophane decision is of great significance because it passed on an aspect of the prohibition against monopolizing any part of interstate commerce which the Supreme Court had not previously directly explored. Under the earlier *American Tobacco* case the Court had held that the test of illegal monopolization is "power" to control the price of a product or "power" to exclude competitors. Even one who has a complete monopoly of a product does not have power to control its price if there are available other products which serve the same end uses as, and cost no more

---

6 *U.S.* v. *Bausch & Lomb Optical Company,* Civ. 46-C-1332, filed July 23, 1946.

7 *U.S.* v. *Luxene, Inc.,* Civ. 66124, filed April 27, 1951.

8 *U.S.* v. *Merck & Co.,* Incl., Civ. 3159, filed October 28, 1943.

9 *U.S.* v. *Walton Hauling & Warehouse Corp., et al.,* Civ. 86-286, filed July 15, 1953; Cr. 141-349, filed June 23, 1953.

10 *U.S.* v. *International Boxing Guild, et al.,* Cr. 21823, filed Jan. 10, 1956.

than, the "monopoly" product. As to power to exclude competitors, those who are "competitors" within this test are not limited to the producers of identical products, but embrace those who make products which compete on even terms, functionally and price-wise, with the "monopoly" product. For these reasons, it may be necessary in monopolization cases to determine what has been referred to as the "relevant market."

In the *Cellophane* case the difference between the majority and the minority represents not a difference in view as to the governing legal principles, but a difference in view as to the facts which are controlling and significant in deciding what products are "reasonably interchangeable" from the standpoint of consumers and purchasers. However, a narrow conception of the monopolization prohibition underlies the majority's selection of the significant facts, just as a broad conception of this prohibition underlies the minority's reliance upon other facts.

The majority deemed it decisive that, throughout the entire spectrum of cellophane's uses, it "has to meet competition" from other flexible packaging materials; and that, except in one respect, cellophane has no functional characteristic not possessed by some other materials. The majority, in making these observations, indiscriminately lumped together completely disparate products, both those which it had always sold at one-half or less of cellophane's price and those that always had sold at double or more cellophane's price. The majority also thought that there was a degree of competition preventing possession of illegal monopoly power because, for particular uses, cellophane supplied varying percentages of total demand and because, for particular uses, cellophane's percentage of the business varied from time to time.

The majority's approach some might argue could mean that in an advanced industrial economy there never can be illegal monopolization even if the product has marked superiority, cost considered, over others, at least if the monopolist aggressively markets his product. Under such marketing the monopolist sells not only to the trade as to which the superiority of his product, cost considered, enables him to dictate the market price. In these circumstances he also sells to trade as to which the product's usefulness in relation to cost gives it little or no advantage over other products. Thus the monopolist, by not confining his sales to the trade in which he has full monopoly

power over price, and by expanding into areas in which this power diminishes to the vanishing point, might, by distorting the courts rationale, argue comes under the majority decision. He would then argue that the competition met in his marginal business negatives possession of monopoly power.

The minority on the other hand, believes that the actual course of trade, as evidenced by the conduct of both buyers and sellers, provided the test of possession of monopoly power. It declared that the vast expansion in the sales of cellophane, accompanied by very high profits by the cellophane monopolist (du Pont), in the face of other supposedly interchangeable products selling at one-seventh to one-half cellophane's price, established cellophane's distinctiveness and the power of a monopolist of cellophane to control its price. The extraordinary success of cellophane, notwithstanding the constant availability of lower priced substitutes, was proof that hardheaded buyers recognized cellophane's advantage, price considered, over "competing" lower priced substitutes.

Du Pont's own words and actions, as seller of cellophane, attested its unqualified belief in cellophane's unique position in the market. Du Pont, in intra-organization studies of competition and market possibilities, unqualifiedly stated that the only other flexible packaging materials produced in volume were not directly competitive with cellophane. In addition, du Pont, by numerous acts and agreements, excluded or sought to exclude competitors. The fact that only one competitor entered the enormously lucrative cellophane business during a period of 27 years established the other angle of illegal monopolization, power to exclude competitors.

The decision, as is so frequently true in appeals in civil antitrust cases, is intertwined with the question of the showing sufficient to overturn the district court's findings of fact. The further circumstance that the division of the court sprang from differing appraisals of what facts were controlling, leave room for fluidity in the Supreme Court's handling and decision of future cases involving illegal monopolization under Section 2 of the Sherman Act.

So much for *Cellophane*. Beyond that decision, you may be interested in the legislative shape of things to come. With this in mind, I turn to legislative changes in the antitrust field the Department of Justice now considers. My beginning point, of course, is the

President's January 1956 Economic Report to Congress. As that Report states:[11]

> . . . The following revisions of antitrust legislation are recommended. First, all firms of significant size that are engaging in interstate commerce and plan to merge should be required to give advance notice of the proposed merger to the antitrust agencies and to supply the information needed to assess its probable impact on competition. Second, Federal regulation should be extended to all mergers of banking institutions. Combined with the requirement for advance notice, this extension of the law would give the Government an opportunity to prevent mergers that are likely to result in undue restraint of banking competition. . . . [And finally] when civil rather than criminal proceedings are contemplated, the Attorney General should be empowered to issue a civil investigative demand, compelling the production of documents before the filing of a complaint, and without having to invoke grand jury proceedings.

Now, just how was the President's major proposals—pre-merger notification, amending Section 7 to cover bank asset as well as stock acquisitions, and the civil investigative demand—rooted in necessities revealed by enforcement efforts to date.

First, pre-merger notification. At the present time some 20 lawyers are assigned to the section of the Antitrust Division with responsibility for, among other things, antitrust merger activity. Beyond these 20 lawyers, some 5 economists sometimes devote part of their time to merger work. Before mergers can be appraised with an eye to clearance or suit, they must, of course, be discovered. And our experience has been that a good part of the time and effort of the junior members of the staff is occupied with ferreting out, before they occur, those mergers with potential anticompetitive effects.

Pre-merger notification should substantially ease this investigative burden. No longer would the staff be required to scan in the same manner the variety of financial periodicals. More important, brought to our attention would be many mergers not presently publicized in advance of consummation.

---

11 Economic Report of the President, January 1956, pp. 78-79.

Not only will the enforcement burden be eased, but pre-merger notification may well benefit the business community. Lawyers representing merging companies have at times stated that disruption of business plans is lessened by Department action before merger consummation. Even in cases where merging companies do not choose to utilize our clearance program, some nonetheless urge that if the Department is to proceed at all, we sue before consummation. Pre-merger notification, it seems clear, should systematize the process by which mergers are sifted and thus enable more prompt action if it is merited.

Further, we believe evenhanded enforcement requires notification. With that requirement, no longer would the company that tries to obey the law and seeks advance approval watch its close-mouthed rival consummate a merger; and thereafter rely on the natural indisposition of an enforcement agency or a court to attempt to unscramble the omelet. Thus minimized is the element of chance discovery in any decision to sue.

With this goal of evenhanded enforcement uppermost, I am surprised pre-merger notification has not generated more widespread support among the business community. My feeling, frankly, is that the proposal is not fully understood.

Within the past several weeks, for example, "A Survey of Business Opinion regarding Pre-merger Notification Legislation," conducted by the Diversification Institute, Inc., came across my desk. That survey asked "500 industrial corporations," among other things: "Do you favor legislation similar to H.R. 9424 described in the accompanying insert?"

H.R. 9424's description "in the accompanying insert," however, is dangerously misleading. For that description apparently assumed that H.R. 9424 provided, not for pre-merger *notification,* but rather for pre-merger *approval.* Thus the accompanying description averred "approval [I repeat, "approval"] of the proposed merger would not exempt the parties from subsequent antitrust attack. Nor [and I still quote from the description] would disapproval deprive them of any defense available to them in such proceedings, in the event they went ahead with the transaction notwithstanding the disap-

proval." Small wonder, then, that many questioned objected that the proposed legislation "would give Government agencies powers that belong to the courts."

Indeed, were any proposal requiring pre-merger approval, as distinct from notification, advanced, this Department would be the first to voice opposition. In the past session of Congress, for example, Congressman Patman introduced a bill requiring pre-merger notification by companies merging, if either party "has capital surplus and undivided profits aggregating more than $1,000,000" but further providing "that the filing of any proceeding by the Commission or the Department of Justice before consummation "shall operate to bar the consummation . . . pending the final adjudication of the issues raised by such proceeding." Regarding the Patman proposal, let me emphasize, this Department testified:

> . . . our feeling is that no prosecutor can always be that sure he is right. By barring consummation pending final adjudication, the filing of suit in effect makes a finding of illegality of the merger—at least until the issues are finally determined. To our view, this not only does violence to traditional concepts of due process, but also eliminates court discretion as to the issuance of any preliminary injunction.

From this you will see that were the proposal in fact as this survey mis-described it, this Department would oppose it as vigorously as would most businessmen.

Beyond this pre-merger notification legislation, we plan to urge plugging that loophole left by present Section 7's failure to cover asset acquisitions by banks. On the one hand, that provision's stock acquisition bar applies to all corporations "engaged in commerce." Section 7's asset acquisition portion, in sharp contrast, covers only corporations "subject to the jurisdiction of the Federal Trade Commission." Further, Section 11 of the Clayton Act exempts banks from Federal Trade Commission jurisdiction by specifying that "authority to enforce compliance" with Section 7 "is hereby vested . . . in the Federal Reserve Board where applicable to banks, banking associations, and trust companies." On the basis of these provisions

this Department has concluded that asset acquisition by banks is not covered by Section 7 as amended in 1950.[12]

As a result, Section 7 if for practical purposes useless to cope with what the Comptroller of the Currency has described as "this recent trend of [bank] mergers, consolidations, and sales." [13] Corroborating the rise in bank mergers, the Chairman of the Board of Governors of the Federal Reserve Board concluded that bank mergers "have gone up steadily." [14] In 1952, his testimony reveals, there were 100 bank mergers. This number jumped to 116 in 1953 and more than doubled to 207 in 1954.[15] Most important, the Federal Reserve Board Chairman concluded, this number is "still rising." [16]

This bank merger trend must be viewed against the background of present commercial bank asset concentration. In 9 of 16 of America's principal financial centers, 2 banks owned more than 60 percent of all commercial bank assets. And in each of these 16 centers, the first two banks owned more than 60 percent of all commercial bank assets. And in each of these 16 centers, the first two banks owned more than 40 percent of all commercial bank assets.[17] Suggesting this degree of concentration may be on the rise is New York City's increasing concentration in bank deposits. Figures supplied by that State's superintendent of banks reveal that in 1900

---

12 Reaching the same conclusion, a House Judiciary subcommittee staff report explained that, because of revisions in amendments to Sec. 7, "it became impracticable to include within the scope of the act, corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by Sec. 11 of the Clayton Act, are therefore circumscribed insofar as mergers are concerned only by the old provisions of Sec. 7 . . . " (Staff report to Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 82nd Cong., 2d sess. (September 1952)).

13 Hearings on Current Antitrust Problems, before House Antitrust Subcommittee, 84th Congress, 1st sess., May 17, 1955, p. 453.

14 Hearings on A Study of the Antitrust Laws, before Senate Antitrust Subcommittee, 84th Congress, 1st sess., June 24, 1955, p. 680.

15 Hearings on Current Antitrust Problems, before House Antitrust Subcommittee, 84th Congress, 1st sess., June 13, 1955, p. 2159.

16 Hearings on A Study of the Antitrust Laws, before Senate Antitrust Subcommittee, 84th Congress, 1st sess., June 24, 1955, p. 2159.

17 Hearings on Current Antitrust Problems, before House Antitrust Subcommittee, 84th Congress, 1st sess., June 8, 1955, p. 1995.

New York City's four largest banks had 20.8 percent of the total deposits. This number had jumped to 53.6 percent in 1935, and to 60.6 percent in 1954. From these figures, it seems clear, emerges a picture of a steadily increasing bank deposit concentration in New York City.[18]

Even though we may still move against this tide of bank mergers under Sherman Act Section 1, our antimerger efforts are nonetheless cramped by Clayton Act Section 7's failure to cover bank asset acquisitions. For mergers may meet Sherman Act standards yet fall before the Clayton Act's more stringent bans. Congress's clear object in its 1950 amendment of Section 7 was to strike some mergers beyond the reach of the Sherman Act. Thus the Senate report explains that the

> bill is not intended to revert to the Sherman Act test. The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.[19]

The report further states that the Act's intent is to have

> broad application to acquisitions that are economically significant . . . [The] various additions and deletions, some strengthening and others weakening the bill, are not conflicting in purpose or effect. They are merely different steps toward the same objective, namely, that of framing a bill which although dropping portions of the so-called Clayton Act test that have no economic significance, reaches far beyond the Sherman Act.[20]

To apply this Clayton Act standard to bank asset acquisitions, as it now does to bank stock mergers, is now under consideration. And this general, broad aim, apart from disagreements over means, is endorsed by the President of the United States, the Department of Justice, the Federal Trade Commission, and appropriate banking agencies. Thus, Governor J. L. Robertson of the Board of Governors of the Federal Reserve System stated before the House

---

18 *Ibid.*, p. 2001.

19 S. Rept. 1775, 81st Congress, 2d sess., 4-5 (1950).

20 *Ibid.*

Antitrust Subcommittee considering like legislation:[21] "The Board favors the objective of this legislation." Endorsing this view the Comptroller of the Currency stated before the House Antitrust Subcommittee (Subcommittee No. 5):[22]

> We are in accord with the general purpose of H.R. 5948. We have no objection to the principle that the acquisition of one bank by another through purchase, merger, or consolidation should not be permitted if the effect of the acquisition may be substantially to lessen competition. It is no less important to have competition in banking, when this can be done soundly, as it is in other fields of commerce and industry.

In the course of analyzing various differences over detail, this broad agreement on principle should not be obscured.

So much for amendment of Section 7 to cover bank asset as well as stock acquisition.

Finally, the civil investigative demand, this proposal would enable the Department of Justice to compel production of documents by corporations, partnerships, and associations—but not individuals—during the investigative or pre-complaint stage of civil proceedings. A bill embodying this proposal was introduced in the last Congress.

We now consider recommending enactment of a like measure next session. Under present law, the Department has no such power. Where criminal proceedings are contemplated, of course, grand jury process adequately enables production of both documentary and oral evidence. Where the Department proceeds with an eye to civil proceedings, however, experience shows the Antitrust Division is severely handicapped. Some potential defendants may voluntarily grant access to their records. In other instances, however, a grand jury investigation must be initiated, and the court's power of subpoena used, in order to obtain documents even though only civil proceedings may be the likely outcome. One result of resort to grand jury is extensive delay and expense. Finally, the Government may resort to

---

21 Hearings before Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives, 84th Congress, 1st sess., on H.R. 5948, p. 50.

22 *Ibid.*, p. 71.

filing a complaint and then make use of discovery processes of the Federal Rules to gather evidence. Effective enforcement, however, requires comprehensive investigation before—rather than after—formal proceedings have been filed.

In pre-complaint merger investigations this demand is particularly important, for Section 7 has no criminal sanction. Accordingly, we cannot resort to grand jury to secure documents from companies under investigation. So it is that enactment of this civil investigative demand is vital to more effective anti-merger work.

LEGAL TESTS FOR VIOLATION OF SECTION 2 OF THE SHERMAN ACT AND SECTION 7 OF THE CLAYTON ACT IN THE LIGHT OF THE CELLOPHANE OPINION

By

JOHN T. CHADWELL*

Introduction

The *Cellophane* case[1] is known primarily for the ruling made upon the question of market definition which was involved. Mr. Gesell will discuss that ruling. However, the *Cellophane* case also has considerable significance (a) as a current interpretation of Section 2 of the Sherman Act in a single firm situation and (b) as a judicial pronouncement which may have considerable effect in cases arising under Section 7 of the Clayton Act. These are the aspects of the *Cellophane* opinion which I will undertake to discuss.

Section 2 of the Sherman Act

Nowhere in the antitrust statutes is "monopoly" declared to be illegal. The fact of monopoly or existence of monopoly power is nowhere expressly outlawed.

There are provisions in the antitrust laws such as Section 2(a) of the Robinson-Patman Act[2] and Section 7 of the Clayton Act[3] which outlaw specified practices where their effect may be substantially to "lessen competition or tend to create a monopoly"; but Section 2 of the Sherman Act[4] does not make a monopoly or monopoly power illegal. Rather it creates an offense of "monopolizing."

> "Every person who shall *monopolize,* or attempt to *monopolize,* or combine or conspire * * * to *monopolize* * * * shall be deemed guilty of a misdemeanor * * *."

---

* Partner—Snyder, Chadwell, Fagerburg & Keck, Chicago, Illinois.

1 *United States* v. *E. I. du Pont de Nemours & Co.* (D. Del., 1953), 118 F. Supp. 41, aff'd (1956) 351 U.S. 377, 76 S. Ct. 994.

2 Clayton Act, Sec. 2; 38 Stat. 730, 49 St. 1528, 15 USC §13(a).

3 Clayton Act, Sec. 7; 64 Stat. 1125; 15 USC §18. As amended by Act of December 29, 1950, c. 1184, 64 Stat. 1125, 81st Cong. 2d Sess. CH. R. 2734, Public 899.

4 Sherman Act, Sec. 2; 26 Stat. 209; 15 USC §2.

In determining whether there has been a violation of the prohibition against "monopolizing" basic questions are:

(a) What product and market area is supposedly "monopolized," i.e., what is the "relevant market" involved in the charge?

(b) Does the defendant have a "monopoly" or "monopoly power" over this market?

(c) If "monopoly power" exists, has the defendant been guilty of such conduct in the achievement, preservation or exercise of that power as to be guilty of "monopolizing"?

It should be noted that the second and third questions do not arise where the charge is conspiracy or attempt to monopolize.

In a conspiracy case it is sufficient to prove that a group of sellers have combined or conspired to achieve monopoly.[5] The offense of conspiracy has been considered to be separate from that where monopoly power is achieved; so that conspiracy may be the subject of punishment in addition to punishment for monopolization even though both offenses grow out of the same course of conduct.[6]

In attempt cases, proof of specific intent to monopolize, without evidence that the intent has been accomplished and monopoly power attained, is sufficient to establish violation of the statute.[7] It has been held, however, that attempt to monopolize loses its identity as a separate offense from monopolization if monopoly power is actually achieved. In that situation the lesser offense merges into the greater offense of monopolization.[8]

The first basic question in a monopolization case is one of market definition. The limits of the market must be defined both geographically and in terms of the products involved. The problems

---

[5] *American Tobacco Co.* v. *U.S.* (1945), 328 U.S. 781, 789; *U.S.* v. *Griffith* (1947), 334 U.S. 100, 107 (n. 9).

[6] *American Tobacco Co.* v. *U.S.* (1945), 328 U.S. 781, 788-789.

[7] Report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) p. 61. *U.S.* v. *Aluminum Co. of America* (CA 2, 1945), 148 F. 2d 416; *U.S.* v. *Columbia Steel* (1948), 334 U.S. 495; *Lorain Journal* v. *United States* (1951), 342 U.S. 143.

[8] *American Tobacco Co.* v. *U.S.* (1945), 328 U.S. 781, 783.

which arise in making this determination will be discussed by Messrs. Gesell and Stocking.

A statement of the legal tests for violation of Section 2 of the Sherman Act involves primarily the latter two questions: Does the defendant possess a "monopoly" or "monopoly power"? If so, does he possess that power or has he exercised that power under such circumstances that he can be said to have "monopolized"?

The terms, "monopoly" and "monopoly power," have rather well-accepted meanings. "Monopoly" refers to a situation where a single seller, or a group of sellers acting in concert, have monopoly power.[9] "Monopoly power" means the power to fix prices or to exclude competition in the relevant market.[10]

The law with respect to these elements of the offense of monopolizing is thus fairly well settled.

There is also rather general agreement that certain types of conduct, when engaged in by one who possesses monopoly power, constitute monopolizing. Thus, one who achieves a monopoly by deliberately predatory tactics designed to exclude competitors and to achieve monopoly is said to be guilty of monopolizing.[11] More

---

9 Attorney General's National Committee to Study the Antitrust Laws (Report March 31, 1955) p. 43. See also *U.S.* v. *Aluminum Co. of America* (1945), 148 F. 2d 416; *U.S.* v. *United Shoe Machinery Corp.* (1953), 110 F. Supp. 295.

10 *American Tobacco Co.* v. *U.S.* (1945), 328 U.S. 781; *U.S.* v. *E. I. du Pont de Nemours & Co.* (1956), 351 U.S. 377, 391-2; 76 S. Ct. 994, 1005; *Standard Oil of New Jersey* v. *U.S.* (1910), 221 U.S. 1, 85; Report of Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) pp. 48-55. See also the charge to the jury in *U.S.* v. *Kansas City Star Co.* (W.D. Mo. 1955), 1955 Trade Cases par. 68,040, p. 70372, affd. Jan. 23, 1957 by the United States Court of Appeals for the Eighth Circuit:

> "If you find and believe from the evidence beyond a reasonable doubt that the Star had the power to exclude competition when it desires to do so then it follows that the corporate defendant possessed monopolistic power."

11 *Standard Oil Company* v. *U.S.* (1911), 221 U.S. 1; *U.S.* v. *American Tobacco Company* (1911), 221 U.S. 106; *U.S.* v. *U.S. Steel Corporation* (1920), 251 U.S. 417. A typical statement of the law was made in the charge to the jury in *U.S.* v. *American Naval Stores Co.* (S.D. Ga., 1909), 172 Fed. 455, 458:

> "The size of a business is not in itself a violation of (Section 2) * * * . The criminal act in the statute is the certain and necessary prevention of all other persons from engaging in such business, and thereby stifling competition. The evil is not the enlargement of the trade of one person or corporation, but the destruction of the trade of all other persons in the same commodity.

recently it has been suggested that any course of conduct which is "deliberately exclusionary" in nature will constitute monopolizing when engaged in by one possessing monopoly power.[12]

It is also settled that a monopolist can be guilty of monopolizing if he engages in exclusionary tactics designed to achieve monopoly, even though these tactics do not amount to restraints of trade in violation of Section 1 of the Sherman Act.[13]

The Attorney General's National Committee has summarized the law in regard to monopolization as follows:[14]

> "Economic monopoly becomes illegal monopolization not only (1) if it was achieved or preserved by conduct violating Section 1, but also (2) if it was, even by restrictions not prohibited by Section 1, deliberately obtained or maintained."

In the *Schine Theaters*[15] and *Griffith*[16] cases a further form of monopolizing is suggested, namely, the use of monopoly power in one market to exclude competition in another market.

Despite this rather general agreement as to what constitutes monopolization, there has been persistent agitation in recent years to declare the mere possession of monopoly power illegal.[17] This

---

> " * * * Since the size of the business alone is not necessarily illegal, it is the crushing of competition, by means of force, threats, intimidation, fraud or artful and deceitful means and practices, which violates the law."

[12] *U.S.* v. *Aluminum Co. of America* (CA 2, 1945), 148 F. 2d 416; *U.S.* v. *United Shoe Machinery Corp.* (D. Mass. 1953), 110 F. Supp. 295.

[13] *Standard Oil of New Jersey* v. *U.S.* (1911), 221 U.S. 1. Cf. *U.S.* v. *Paramount Pictures, Inc.* (1948), 334 U.S. 131, 171:

> "In the popular sense there is a monopoly if one person owns the only theater in town. That usually does not, however, constitute a violation of the Sherman Act. But as we noted in *United States* v. *Griffith* * * * and *Schine Theaters, Inc.* v. *United States* * * * even such ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade."

[14] Report, p. 43.

[15] *Schine Theaters, Inc.* v. *U.S.* (1947), 334 U.S. 110.

[16] *U.S.* v. *Griffith* (1947), 334 U.S. 100.

[17] E. G. Rostow, "Monopoly under the Sherman Act: Power or Purpose?" (1949) 43 Illinois Law Review 745.

has been a normal accompaniment of agitation for per se rules in many phases of antitrust including price discrimination, requirements contracts and mergers in addition to the already established categories of price fixing, division of territory, patent tying practices and coercive boycotts.

The agitation wholly disregards the criminal nature of Section 2 and overlooks the fact, adverted to by Judge Hand in the *Alcoa* case,[18] that monopoly may result from the normal operation of competitive forces.

A fundamental premise upon which the antitrust laws are based is the notion that the public interest is best served by permitting the forces of free competition to regulate our economic system. We believe, for example, that the best price is that which is established by competition. We also believe that only those elements in our economy which have evolved from competition in a free market, and have thereby proved themselves through the trial and error process to best serve our needs, should survive. If monopoly results from the free play of competitive forces unencumbered by artificial restraints imposed by a monopolist, there is a strong presumption that it is probably the most suitable form of economic organization for the particular market where it exists.

Also, if our fundamental belief in the ultimate wisdom of decisions reached by the free play of competition is sound, monopoly, if it exists, will not continue to exist unless it continues to be economically justifiable. If monopoly does not satisfy economic needs, the normal forces of competition will bring it to an end, provided the monopolist does not take steps to prevent them from operating. The very presence of monopoly profit, for example, is an invitation to others to enter the field.

Accordingly, if the basic premise of the antitrust laws is sound, prohibitions should be directed not against monopoly itself but against conduct leading artificially to monopoly or artificially preserving monopoly where it would not otherwise arise or exist as a result of the normal operations of competition.

When this fact is understood, it becomes clear that a prohibition of monopoly as such is not consistent with basic antitrust policy. Rather it would be a form of regulation of industry structure based

---

18 *U.S. v. Aluminum Co. of America*, op. cit., 148 F. 2d 416, 429, 430.

not on the tested judgment of the market place, but upon certain preconceived standards evolved by economists on the basis of theoretical norms about which they themselves do not agree. If instead of a structure test, a judgment with respect to monopolizing is to be based on economic performance of the industry (the so-called "performance test" frequently suggested by Professor Stocking who appears on this program), the judgment would again be based on conclusions of what ought to be rather than upon the judgment of the market place. Whatever the test, such regulation interferes with rather than protects the normal operation of competition which the antitrust laws are designed to foster. It is the process of competition, and not any particular form of industrial structure, which is the darling of the antitrust laws.

This basic truth was recognized by Chief Justice White in the *Standard Oil of New Jersey* case[19] forty-seven years ago. Justice White observed[20] that, although the statute by the comprehensiveness of the enumerations made in Sections 1 and 2 made it clear that it was intended to prevent restraints of every kind and nature, it nevertheless did not prohibit monopoly in the concrete. The omission he said—

> "indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from

---

19 *Standard Oil Co.* v. *U.S.* (1910), 221 U.S. 1.

20 *Ibid.*, 221 U.S. at p. 62. At page 55 of the opinion appears a similar observation of the Chief Justice with respect to the common law:

> "It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained some of the consequences of monopoly might result. After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right."

the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted."

This, I believe, is the essence of the so-called "thrust upon" exception to Section 2 suggested by Judge Hand's opinion in the *Alcoa* case.[21] One does not monopolize by merely possessing monopoly power. Moreover, the fact that one is found to be in possession of monopoly power does not prove that he has monopolized. A further element of proof is necessary, namely, evidence that the monopoly power resulted not from normal competitive causes, but from exclusionary tactics engaged in by the monopolist.[22] Among the normal competitive causes of monopoly suggested by Judge Wyzanski in the *Shoe Machinery* case were ability, natural forces, law, use of accessible resources, the process of invention, and innovation and employment, financing, production and distribution which a competitive society must foster. These are not elements which readily lend themselves to categorization. They become apparent only in a case by case analysis of all of the relevant facts involved in the particular monopoly situation presented to the court.

The *Cellophane* litigation represents an important setback for those who reject this view of the prohibition against monopolizing, and urge that mere possession of monopoly power should be sufficent to constitute the offense.

The *Cellophane* complaint charged du Pont with monopolizing, attempting to monopolize and conspiracy to monopolize interstate commerce in cellophane. The case was tried and lost in the District Court on all three issues. In the Supreme Court, the government threw away its case on attempt and conspiracy, normally its most potent weapons, and confined its attack to "the ruling that du Pont has not monopolized trade in cellophane." [23]

---

[21] *U.S.* v. *Aluminum Co. of America*, op. cit., 148 F. 2d 416.

[22] See *U.S.* v. *Aluminum Co. of America, Ibid., U.S.* v. *United Shoe Machinery Company* (D. Mass., 1953), 110 F. Supp. 295 at p. 344. Affirmed per curiam (1955) 347 U.S. 521.

[23] 76 S. Ct. 994, 998.

Why the government took this position is known only to it. Perhaps it was in the hope it could induce the court to hold that mere possession of monopoly power is illegal. Thus, in the District Court, the government argued that mere possession of monopoly power regardless of its exercise is sufficient to constitute monopolization.[24] To avoid the "thrust upon" exception established in the *Alcoa* and *United Shoe Machinery* cases, the government also argued in the District Court that this exception applied only where monopoly has been thrust upon the defendant "through circumstances beyond its control." By this the government meant, according to Judge Leahy, that only a monopoly obtained by a defendant who can be shown not to have done anything to further its own interests comes within the exception.[25]

Judge Leahy rejected both of these arguments. Of the contention that mere possession of monopoly power is sufficient to constitute monopolizing, he said:[26]

> "It has been recognized under the Sherman Act 'monopoly in the concrete' is not prohibited under the section. *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619. The Act, using the verb 'monopolize,' prohibits conduct rather than status. It is directed against activities rather than results. This is not a matter of semantics. It is a matter of facts. That this is so is obvious from fact the statute carried criminal as well as civil sanctions. Thus, decisions recognized the manner in which a monopoly position was obtained was a crucial consideration in determining whether or not a defendant has monopolized within the meaning of the Act.
>
> "The decisions state a defendant may lawfully obtain a monopoly position if that position is 'thrust upon it.' Thus the right to normal growth and to enjoy the results of technical achievement and successful competition has been preserved."

[24] 118 F. Supp. 214. See also 240 U.S.L.W. 3102, Oct. 18, 1955.

[25] 118 F. Supp. 215.

[26] 118 F. Supp. at pp. 214-215.

The government's further contention that the thrust upon exception applies only where monopoly is thrust upon a defendant through circumstances beyond his control, Judge Leahy termed "theoretical" and not supported by decisions. On analysis, he said, the argument amounted to a contention that the manner of acquiring monopoly power is irrelevant and to a conclusion that when du Pont pioneered the cellophane business and thus became the sole manufacturer of cellophane it necessarily became a monopolist and that thereafter everything it did was a violation of Section 2.[27]

In Judge Leahy's opinion this conclusion was ridiculous in view of the consistent recognition in the legislative history of Section 2 and the cases decided since its enactment that Section 2 was not directed at one "who happens by his skill and energy to command an innocent and legitimate monopoly of a business." [28]

After reviewing the legislative history and the cases, Judge Leahy formulated the legal test of monopolizing as follows:[29]

> "The basic question is not determination whether one monopoly is good or the other bad. The teaching of the cases is concerned with how power is achieved. They place acts, not results in issue. A position achieved by 'superior skill, foresight and industry' or one resulting from 'a new discovery or an original entry into a new field' cannot be achieved through circumstances beyond a defendant's control. Intense research activity, market development and expansion of productive capacity were a necessary part of du Pont's development of cellophane. The Sherman Act was not intended to discourage these things by condemning them as violations of §1, or by condemning their result as a violation of §2, as long as results do not flow, in fact, from a course of monopolistic behavior such as followed by Alcoa—'a persistent determination to maintain the control' which it had come to be possessed of, in that case, by reason of originally unlawful acts, 143 F. 2d at page 430."

---

27 118 F. Supp. at pp. 215, 217.

28 118 F. Supp. at p. 215.

29 118 F. Supp. at p. 216.

Because of the conclusion which the Supreme Court reached on the question of the existence of monopoly power, it did not become necessary for that court to consider the issue thus presented by the government's contentions in the District Court. However, there is unmistakable evidence in the majority opinion, the concurring opinion and the dissenting opinion that the government's contention would also have been rejected by the Supreme Court if it had become necessary to do so.

The majority opinion recognized, for example, that even if it were to be decided that du Pont had monopoly power there still would be additional issues in the case, namely, the findings by the District Court that even if du Pont possessed monopoly power it would not be subject to Sherman Act prosecution because (1) the acquisition of that power was protected by patents and (2) that power was acquired solely through du Pont's business expertness.[30]

The majority opinion also quoted[31] with apparent approval the statement of Senator Hoar in debate which accompanied the passage of the Sherman Act that "monopoly involved something more than extraordinary commercial success, * * * it involved something like the use of means which made it impossible for other persons to engage in fair competition." "This exception to the Sherman Act prohibitions of monopoly power," the court said,[32] "is perhaps the monopoly 'thrust upon' one of United States v. Aluminum Co. of America. * * * "

This statement coupled with a reference elsewhere in the opinion[33] to the Rule of Reason as a device whereby a workable content is given to antitrust legislation and a subsequent statement in the opinion[34] that Section 2 requires the application of "a reasonable approach" in determining the existence of monopoly power, seem to be clear indications that when called upon to do so the court will differentiate between monopolies depending upon how they are acquired.

---

30 76 S. Ct. at p. 999.

31 76 S. Ct. at p. 1004.

32 76 S. Ct. at p. 1005.

33 76 S. Ct. at p. 1002.

34 76 S. Ct. at p. 1006.

Justice Frankfurter wrote a concurring opinion apparently for the express purpose of pointing out that there is a "boundary between the course of events by which a business may reach a powerful position in an industry without offending the outlawry of monopolizing under §2 of the Sherman Act and the course of events which brings the attainment of that result within the condemnation of that section * * *."[35] He also pointed out[36] that this is a question which can only be decided on a case by case basis in the light of all the relevant facts before the court in a particular case.

The dissenting justices, having determined that du Pont did have monopoly power went on to consider the further issue of whether du Pont had attained that power by means which would constitute monopolization. They concluded it had, pointing out that du Pont—

> "sought and maintained dominance through illegal agreements dividing the world market, concealing and suppressing technological information and restricting its licensee's production by prohibitive royalties, and through numerous maneuvers which might have been 'honestly industrial' but whose necessary effect was nevertheless exclusionary."[37]

It seems clear, therefore, that the government's position in the *Cellophane* case that mere possession of monopoly power is illegal was rejected by all of the justices who participated in the litigation. Apparently, we have not yet reached the point where the Supreme Court is willing to regulate the form of our industrial organization. I trust that there will be increasing recognition of the fact that so long as the economic organization of an industry results from the free play of competitive forces, it is probably best suited for our needs; and should not be disturbed. Our concern should continue to be as it has been in the past, with protecting the operation of the competitive process from artificial restraints; not with undoing the results of the process on the basis of *a priori* judgment as to what is and what is not an efficient or satisfactory form of economic organization.

---

35 76 S. Ct. at p. 1016.

36 76 S. Ct. at p. 1017.

37 76 S. Ct. at p. 1023.

Section 7 of the Clayton Act

Section 7 as amended in December, 1950 prohibits acquisition of corporate assets as well as stock, where both corporations are in interstate commerce where "in any line of commerce in any section of the country the effect may be ***substantially to lessen competition or tend to create a monopoly.***"

The *Cellophane* case involved a charge of violating Section 2 of the Sherman Act. Section 7 of the Clayton Act was in no way involved. Yet the decision may have a bearing on future action under both statutes.

There have been no court decisions on the merits under amended Section 7, but the following statements may be the law based on the legislative history and a few decisions under the section which exist in preliminary stages of litigation. This is not to say, however, that there are not some pending actions in which there are indications that governmental policy is contrary to the interpretation of the law stated here.[38]

In a Section 7 case "quantitative substantiality" alone is not sufficient to show adverse competitive effect under Section 7. This

---

[38] A fairly complete list of pending Section 7 cases as of the date of this meeting is as follows:

Name	*Date Filed*
Pillsbury Mills, Inc.	June 16, 1952
(Luria Bros.) (United States Steel, *et al.*)	January 19, 1954
Crown Zellerbach Corp.	February 15, 1954
Farm Journal, Inc.	June 30, 1955
(Union Bag & Paper Corp.) (Hankins Container Company)	June 30, 1955
A. G. Spalding & Bros.	December 8, 1955
Foremost Dairies, Inc.	January 17, 1956
Scovill Manufacturing Co.	March 12, 1956
Brillo Manufacturing Co.	May 22, 1956
Scott Paper Company	June 1, 1956
Fruehauf Trailer Company	August 17, 1956
The Vendo Company	October 11, 1956
National Dairy Products	October 16, 1956
The Borden Company	October 16, 1956
Beatrice Foods Company	October 16, 1956
Erie Sand & Gravel Co.	October 30, 1956
International Paper Co.	November 6, 1956
Gulf Oil Corporation	December 13, 1956
Schenley Industries, Inc.	February 14, 1955
General Shoe Corporation	March 29, 1955
(Hilton Hotels Corporation) (Statler Hotels Delaware Corp.)	April 27, 1955

is at least the effect of the preliminary decisions which have been rendered in the *Pillsbury* case[39] and *Brown Shoe* case.[40] I assume, therefore, that a showing of combined production and sales figures—"market shares"—of the acquired and acquiring company compared to total industry figures in the relevant market area do not make out a per se violation of Section 7.

Section 7 differs, apparently, from Section 3 under which such decisions as the *Standard Stations* decision[41] indicate that a per se rule applies at least in the case of requirements contracts. The Federal Trade Commission said in the *Pillsbury* case that in addition to market sharing, there must be, in proceedings under Section 7, case by case examination of all relevant factors in order to ascertain the probable competitive consequences of the acquisition. It was said that this means full information on merger history, business conduct, market structure and performance and all economic evidence tending to show probable competitive consequences. There is no per se violation of Section 7 arising from the mere size of the acquisition or of the acquiring or acquired companies unless there is the necessary probability that the consequences will be those prohibited by the statute.

In order to determine competitive effect of an acquisition in a Section 7 case, it is necessary, therefore, to define the relevant market

Name	*Date Filed*
Minute Maid Corporation	September 7, 1955
(Brown Shoe Company, Inc.) (G. R. Kinney Co., Inc.)	November 28, 1955
(American Radiator & Standard) (Sanitary Corporation)	March 30, 1956
(Continental Can Company, Inc.) (Hazel Atlas Glass Company)	September 10, 1956
Continental Can Company, Inc. (Robert Gair)	October 30, 1956
(Maryland & Virginia Milk) (Producers Association)	November 21, 1956
Owens-Illinois Glass Company	December 4, 1956
(Bethlehem Steel Corporation) (Youngstown Sheet & Tube Co.)	December 12, 1956

39 *Matter of Pillsbury Mills, Inc.,* FTC Dkt. 6000 (1953), Trade Regulation Reporter (9th Edition) Pars. 11,582, 11,605.

40 *U.S.* v. *Brown Shoe Company and G. R. Kinney Co., Inc.,* 1956 Trade Cases, Par. 68,244. Also *Board of Governors* v. *Transamerica Corp.* (CA 9, 1950), 184 F. 2d 311.

41 *Standard Oil Company of California* v. *U.S.* (1949), 337 U.S. 293.

area and the relevant product or products properly involved in the case. In short, it is necessary in such a case, just as in a monopolization case under Section 2 of the Sherman Act, to determine at the outset: what is the relevant market?

The necessity for defining the relevant market in Section 7 cases gives significance to the *Cellophane* opinion in such cases as well as in cases under Section 2 of the Sherman Act.

LEGAL PROBLEMS INVOLVED IN PROVING RELEVANT MARKETS

by

GERHARD A. GESELL*

This is the first time I have met Professor Stocking although not the first time I have been made aware of his vigorous views about the *Cellophane* case. It is a great temptation to debate with him, but that, of course, is not the purpose of this program. Professor Stocking freely criticized du Pont's position while the case was sub judice and the ethics of our profession did not permit a reply. It was far more difficult then than now to avoid a debate. Now that a majority of the Supreme Court disagrees with him I am quite satisfied to rest on that verdict. The whole difficulty between us comes from the fact that Professor Stocking has refused to accept the facts as found by the District Court. You will have noted his refreshing confession that economists are not always objective observers but rather tend to see what they start out to look for—confirmation of their own particular theories. The more objective appraisal of the record by the Court speaks for itself.

This is a working session of lawyers and my assignment is a wholly practical one. It would be most satisfying at this juncture to tell you that the successful result in the *Cellophane* case was due to novel theories developed by defense counsel, supported by new types of evidence never before seen in antitrust litigation. Unfortunately, neither of these comments can be made. To be sure, the problems which defense counsel confronted in proving market facts were to some extent novel. There were several previous cases where interproduct competition had been considered and held to be relevant in antitrust suits. In most of these, however, the proof was sketchy. There was, moreover, no case where a successful effort had been made to prove the absence of monopoly power by relying on interproduct competition.

The *Cellophane* case was, of course, a single firm monopoly case confined to Section 2. The complaint charged that cellophane was

---

* Covington & Burling, Washington, D.C.

unique for the purposes for which it was sold and alleged that du Pont possessed market control and monopoly power over both manufacture and sale. The complaint went on to describe in some detail du Pont's alleged power to exclude others from the business and to set prices at arbitrary non-competitive levels. Since these claims conformed with the tests laid down in the *Aluminum* and *Tobacco* cases, du Pont accepted the Government's definition of the offense in terms of monopoly power. In denying the allegations du Pont relied on the intense competition between cellophane and other flexible packaging materials. On the opening du Pont made clear that in its view of the case the powers claimed would have to be proven and could not merely be implied from the Company's size or its percentage of the business. It asserted that cellophane was not unique for the purposes for which it was sold and that the competition of other materials had forced du Pont constantly to reduce its cellophane prices and otherwise deprived du Pont of the freedom of action which monopoly implies. Du Pont's position was, in essence, that before findings as to price or other aspects of monopoly power could be made a detailed understanding of how all phases of the market operated was required.

When it came to the proof it was a relatively simple matter to identify some of the principal flexible packaging materials and to present general testimony that these materials competed with cellophane. Once the evidence went beyond this, facts became complex. This was not a market where two or three products alone participated and where the uses of the products were few. There were literaly hundreds of types of flexible packaging materials sold in many different combinations, under widely differing conditions and for a great variety of end uses. There were, for example, over 50 distinct types of cellophane alone. Some of these cellophane types differed from each other in their physical properties more than some types of cellophane differed from certain other flexible packaging materials. Materials such as wax papers and glassines were also made in scores of types reflecting a wide range of quality and function.

On top of this, cellophane was sold for many different uses. It was used for display or for protection. It was on the inside of the package or on the outside. It was used alone or in combination with other materials. It was sometimes printed, sometimes transparent and

sometimes opaque. The problems encountered in wrapping hard candy, for example, were entirely different than those presented by chocolate bars. Frozen foods differed from raw vegetables. Meat differed from cereals. For each such use special types of cellophane had been developed. Other flexible materials, but not necessarily all materials, competed for these same uses. The various materials differed from use to use and their competition varied depending on price and functional characteristics that most suited each use. It was for this reason necessary to treat the market as a group of segments and to show separately the competitive facts of each major end use segment in order to get a true picture of the whole.

This enormously complicated the problems of proof but nonetheless made it more meaningful. Once the market facts were understood generalities urged by the government could no longer be accepted. The fact that cellophane was the lowest cost wholly transparent material, for example, a point urged by the Government, made little difference where in many uses transparency was unnecessary or even a detriment. Or again, the fact that cellophane was lower cost than Pliofilm made little difference when it was shown that because of Pliofilm's superior strength and particular performance under certain conditions it was considered preferable to cellophane by many users, particularly certain important wrappers of fresh meat. The more the proof was focused on the actual operations of the market, the more intense the competition appeared and the more difficult it became for the Government to counter the evidence.

The proof was not confined to a given year. Rather, the history of the flexible packaging business was chronologically developed to show as quality and price changes occurred how one material often supplanted another only to lose out again as new developments took place in the market. This emphasized the volatile nature of the market, demonstrated its sensitivity to price and quality and illustrated how business could be gained or lost by the research and merchandising techniques of any seller.

Generally speaking, there were several major factors which made du Pont's market presentation possible. The Company's conduct had not been such as to suggest the "dead hand of monopoly." Here was a product whose price had been constantly reduced, a product whose quality was being constantly improved by energetic research, a

company that was constantly improving the efficiency of its manufacturing processes and passing on the savings to the consumer. Production was expanding and new uses were being developed. No consumer complained of service or quality. In other words the expected results of competition were present and it was only necessary to demonstrate that competition caused the results.

Moreover, as one looked at the market there were helpful factors present which certainly will not be found in many markets. In the first place, cellophane was being constantly consumed. You do not buy cellophane as you would a pair of shoes with only an occasional repeat purchase. Purchasers of cellophane were constantly in the market seeking new materials for their packages. Second, all the different flexible packaging materials could be used interchangeably on packaging machinery. Thus it was possible without any substantial expenditure or additional investment for packagers to shift from one material to another freely as they chose.

Finally, this was not, as so much of the discussion suggests, a case concerned with "substitutes." It was not necessary to rely on the theoretical argument that under certain business conditions another product would be available to consumers and might supplant, that is to say, be substituted for cellophane. Cellophane itself was seeking to break into a market already dominated by lower priced products sold in substantial volume. The case concerned existing, actual, day-to-day competition in the most immediate and practical sense of that term. Flexible packaging materials were, in fact, and beyond dispute sold at the same time, to the same classes of customers, for the same purposes and were indeed functionally interchangeable.

This, then, was the general context in which du Pont had to marshal its proof. The defense was not concerned with defining the outermost limits of the market but sought only to negative the existence of prohibited monopoly power. By concentrating on this narrower issue raised so specifically in the pleadings, conceptual problems about how to define the market with precision became irrelevant. It became unimportant to determine whether the market should be said to include rigid cartons, some tin cans, heavier weights of paper and the like, all of which were used to some extent for the same purposes as cellophane. It was necessary only to demonstrate that there were products which exerted sufficient eco-

nomic pressure over wide enough areas to prevent, and which did in fact prevent, du Pont from obtaining the economic power it was asserted to possess. If some flexible packaging materials in fact competed in substantial volume with cellophane to such a degree that competitive factors rather than du Pont's volition determined cellophane prices, then monopoly power over cellophane prices did not exist in fact. This du Pont sought to prove and succeeded in proving as numerous precise findings establish.

Perhaps the best way to get the flavor of the trial and to indicate some of the problems that were encountered in dealing with the market evidence is to discuss the nature of the proofs presented. Du Pont relied in part on documentary evidence. Quite early in the trial preparation an affirmative search of the du Pont files was made which turned up numerous useful documents. These included documents showing du Pont's concern with the competition of other flexible packaging materials, market surveys, analyses of potential cellophane uses and competitive information of all kinds. The most effective documentary source was also the most tedious to develop. For many years du Pont had required its cellophane salesmen to make daily sales reports covering each sales visit. Fortunately not all of these reports had been destroyed. In fact, there were approximately 75,000 of them in the files. Careful reading of this material turned up a great deal of contemporaneous documentation of the day-by-day competition between the principal flexible packaging materials. Since these reports had been prepared without regard to the litigation, they were entitled to substantial weight, and many sentences taken from them gave color to the case.

Another type of documentation also proved persuasive. Over the years du Pont had spent millions of dollars on cellophane research. Analysis of documented research projects showed du Pont's constant concern with the competitive advantages of the other materials and reflected its efforts to make cellophane more widely acceptible in the market.

Another useful documentary source was found in the trade literature. A review of the trade publications of the bakery trade, the candy trade, etc., revealed advertisements which had been placed in these publications over the years by various manufacturers and converters of flexible packaging materials. These ads were assembled

and organized chronologically by major end uses. In this fashion it was possible to show that each manufacturer of flexible packaging material was claiming that his product was preferable for the same uses where cellophane was employed, and at the same time to demonstrate objectively the vigor and the nature of the competition.

The packaging trade also had publications which discussed packaging developments as they occurred, which reviewed historical developments in the field, and which commented in considerable technical detail on the ability of various materials to serve particular packaging needs. Articles covering these matters were assembled and offered in bulk to the court for judicial notice and subsequent study. All information the court was asked to judicially notice was organized and bound in readable form for his convenience.

There were also physical exhibits. Too often, in the trial of law suits of this kind, one forgets that judges are anxious to have direct contact with the subject matter of the litigation. Thus du Pont tried in every way possible to bring the judge into contact with the business realities. The court had viewed the actual processes of cellophane manufacture in operation prior to the introduction of evidence. Similarly, when it came to the market part of the case du Pont brought into the courtroom numerous physical samples illustrating different kinds of packaging and different kinds of packaging materials. The court was able to feel, examine, and compare the materials and package samples as they were actually found in the market place and constantly referred to in the exhibits for a better understanding of the testimony. These same physical exhibits provided a main prop for the argument in the Supreme Court.

One of the most effective days for the defense occurred when a chief sales representative of a glassine company presented in court packaged goods he had purchased at a supermarket near the courthouse on the previous day with a view to demonstrating the sharp competition between cellophane and other materials. The witness was able to hand up frozen food, potato chips, bread and many other items which he had found side by side on the shelves, showing examples of each item cellophane wrapped and other examples of the same food product wrapped in one or more of the competing materials which had been found on the same shelf.

Physical evidence came in from still another and unexpected source. In the middle of the case, as evidence concerning the market was being developed by the defense, the Judge noticed a reference in the newspaper to the Annual Packaging Show then being held at Atlantic City. He indicated from the bench that he wished to go to the Show to see whether or not it would throw light on the issues being litigated. None of us on either side knew what the exhibits might reveal. Thus it happened that without any advance warning, counsel for both sides accompanied the court while for an entire day he inspected exhibits presenting all phases of the flexible packaging business. To the rising enthusiasm of du Pont counsel as the party walked from exhibit to exhibit, the judge encountered the most practical and concrete evidence possible of the interproduct competition which the witnesses had been talking about at the trial. After that visit it was obviously difficult for the Government to carry the day with its theoretical arguments that the materials did not compete because they had a different chemical composition, or a different specific gravity, or a different feel or appearance. The court had seen price and product competition at firsthand.

Du Pont relied, however, primarily upon third party testimony. This was for two reasons. The Government's case had been primarily documentary and as such was necessarily rather stale and lifeless. By the end of the Government's case the judge had digested about as many documents as a human mind could encompass and du Pont felt the court would welcome talking with people who knew something about the subject firsthand. In the second place, counsel felt that testimony and exhibits originating solely from du Pont witnesses might not be sufficient to carry to a successful result. There were men in the du Pont Company thoroughly familiar with the market in all its aspects and some of these were called as background witnesses. They necessarily could, however, only speak from the viewpoint of a cellophane manufacturer.

Accordingly, it was decided to go out into the market place and find third party witnesses who had no stake in the outcome of the litigation and whose testimony would enable the judge to see the operations of the market place in a very realistic and concrete way. Officials of the competing companies, representatives of converters, purchasing agents of different concerns that package goods, the

manufacturers of packaging machinery, and packaging experts were called to testify for the defense. From more than 50 witnesses interviewed, witnesses were selected whose testimony covered each major end use, who represented a fair geographical coverage of the country, and who were representative of both small and large competitors and converters. This testimony was complete and quite colorful. The District Court relied heavily on it as his opinion reveals.

In summarizing the oral evidence at final argument, it was possible to refer to particular market testimony involving candy, snacks, cookies, baked goods, cereals, frozen food and meats, cheese and other miscellaneous end uses. Within each of these end uses testimony was also extremely detailed. For example, in the field of candy, there was testimony covering candy bars, lollipops, caramels, rolled mints, peppermint patties, chocolate bars and chewing gum, to name but one example. By this process a record was made which it was hoped would prevent a collateral attack on the proof, either on the ground that the testimony was incomplete, overly selective, or based only on evidence from interested witnesses.

No matter how much proof is presented to show the nature of the competition in a market case, a statistical summary of the end results of that competition is essential. Reliable statistics from which a quantitative measure of the interproduct competition could be obtained is required. There was, unfortunately, a serious absence of reliable market statistics. An enormous amount of work was necessary to show the most elementary statistical facts.

The problem was to show how much of each flexible packaging material was used for each of cellophane's major end uses such as cereal, bread, candy, potato chips and so forth. Government and trade association sources were wholly inadequate. No data could be found in other published sources. Accordingly, it was determined that du Pont would have to make an independent trade study to obtain market statistics.

Since there were thousands of customers using flexible packaging materials it was impractical to get figures from them. However, it was an accepted fact that approximately 35% of all cellophane was sold through converters. These converters buy not only cellophane but many other flexible packaging materials and sell them to packagers in plain or printed form. Analysis of converter sales would obviously

give a good cross section of the market, but their records did not show how much of each material was sold for cereal packages or for tobacco pouches or potato chip bags, etc.

It was determined, therefore, to have a physical count and analysis made of the invoices of one year's business of 19 major converters who agreed to cooperate. This was a formidable undertaking. The 19 converters had approximately 500,000 invoices or orders located at 25 different plant locations from coast to coast. To compile the statistics required about a year's work under the supervision of 3 full-time men using approximately 200 employees of the converters, as well as 20 statisticians. Employees of Robert Heller and Associates of Cleveland, who handled the statistical study under the direction of counsel, alone logged about 16,000 man-hours on the work and in addition IBM ran some 2,000 machine-hours. A mass of material and working papers resulted which were ultimately boiled down to a few key tables of inestimable value in filling out the proof.

So much for the types of proof employed. One criticism of the *Cellophane* decision has been that it will unduly protract and complicate antitrust litigation. Experience in the law suit does not bear this out. It may interest you to know that du Pont's entire market case, which consisted of approximately 334 exhibits and 23 witnesses was presented to the court in 10 courtroom days.

The case was tried before an experienced judge, Judge Paul E. Leahy, Chief Judge of the District of Delaware, who had served as a member of the Prettyman Committee of the Judicial Conference concerned with developing procedures for expediting antitrust trials. It was both at his prodding and on initiative of counsel that trial techniques were found which facilitated proof. Perhaps you would be interested in hearing about a few of these.

1. Before any of the proof was admitted, indeed five months before the defendant was required to put on its case, the court required the defense to make an offer of proof on the market. It was only after a full day's argument and a very detailed and well documented presentation of the market theory and proposed evidence that Judge Leahy ruled the market evidence would be admitted. This aspect of the trial has frequently been overlooked. It would have been possible for the court to have excluded any market evi-

dence if du Pont had not been able to make an effective offer at the outset.

2. The pre-trial order provided that statistical schedules could be introduced without having the underlying material in court, provided the schedules were turned over to the other side a month in advance and the supporting materials made available for check and analysis. This procedure was followed. The highly important market statistics compiled in the manner already indicated had, for example, all been thoroughly checked in advance by a Government team of accountants and lawyers. When the schedules were offered at the trial the objections were not over the correctness of the figures or minor aspects of the procedures followed in compiling them and it was possible to move immediately to the substance of the proof without the waste of Court time and effort that is so frequently involved in this kind of proof.

3. All documentary exhibits were shown to the other side in advance. All objections to the exhibits were submitted in writing in advance. The exhibits were all numbered and paginated in advance. The result of this was that du Pont was able to present its market exhibits to the court already bound with exhibit numbers arranged in the order of presentation and their introduction into evidence took simply a matter of moments. Counsel were permitted to discuss pertinent parts of the exhibit with the court unencumbered by technical objections or mechanical difficulties. It required only two court days to cover the defendant's documents on the market aspects of the case.

4. A substantial amount of the proof was taken by deposition. Du Pont decided to bring before the Court typical witnesses representing competitors, converters and packagers. Comparable testimony from other witnesses in these categories necessary to fill out the record was taken by deposition. At an appropriate break in the trial, depositions were taken in several parts of the country. Procedures recommended in the Prettyman Report for preparing narrative summaries of each of these depositions were then employed. The Government could find no material inaccuracies in the summaries and they were then put together in the form of a printed book. Du Pont offered the summaries in evidence as a single exhibit and

they were so received. Thus, with only a few minutes of court time the court had before it the testimony of 16 market witnesses in a readily readable printed volume of 350 pages indexed and cross-referenced fully to the pertinent testimony in the depositions.

Most of these techniques and procedures were well suited to this particular case. Whether or not they should be used in other market cases is conjectural. This would depend a great deal on whether comparable types of evidence were available.

The *Cellophane* case did not involve any revolutionary theories of law nor will it in any way undermine the strength and effectiveness of the antitrust laws. Those of us who spend a good deal of time in the antitrust field tend to parse out these decisions as though they were statutes, but of course they are nothing of the sort. It is a mistake to place too much significance on any particular phrase or comment found in one of the opinions. It is only the broad result that is significant, and that result is usually, if not always, reached on the basis of the facts. Certainly this is the principal lesson of the *Cellophane* case.

The District Court made approximately 150 specific detailed findings concerning competition in the cellophane market. Each of these findings was documented with record references. In the Supreme Court the Government did not challenge a single one of these findings, only the conclusions the court drew from them! Indeed, the Government found it very difficult—we felt impossible—to make an argument that did not run counter to findings which it itself had been forced to accept on the weight of the evidence, even when viewed from the Government's special position.

The opinion, moreover, went to great lengths to emphasize the particular findings before it. A good number of the findings will be found quoted in full in the footnotes, many are referred to throughout the opinion and there are three appendices to the opinion which present many more findings in detail. All of this simply serves to emphasize that the *Cellophane* case is in large degree a case peculiar to its own particular facts.

Looking back on the case, the factor that probably had more to do with the result than any other was that du Pont presented convincing market testimony from witnesses who had a firsthand knowledge of the business. To be sure, du Pont's own witnesses

contributed a great deal, but I suspect that the District Judge and the Supreme Court were most impressed by the evidence which came from du Pont's competitors in the flexible packaging business, by the physical exhibits, trade literature, and other comparable proof from objective sources.

There would have been more difficulty had du Pont chosen to rely on the testimony of economists and market analysts rather than this concrete evidence taken from those who had firsthand experience in the market place.

The problem with testimony of economists and market analysts in cases of this kind is that when men with this specialized training take the stand they are under serious handicaps. They don't have any firsthand knowledge of the business, and since they have been specially retained to present testimony the court may question whether their evidence is tinged with an element of self-interest. This is, of course, an over-generalization and undoubtedly there are cases where because of the nature of the business involved, technical proof of this kind may be required and will be effective. There are many competent economists and market analysts whose ability is superior and whose independence is carefully maintained. Nonetheless, as a practical trial matter it does not seem that this kind of testimony can take the place of the grass roots variety of evidence which was used in the *Cellophane* suit.

The Government did not call a single market witness to counter du Pont's proof. Had the defense relied on theoretical expert testimony to explain the market to the court this would probably not have been the case. For one serious difficulty with expert economic testimony of this kind is that it can be so readily matched by testimony from the other side. One has only to read the extensive literature which is developing about the *Cellophane* case in the economic journals to see that there are already several economists lined up on each side of the controversy. Many of you have undoubtedly tried "just compensation" cases. You know that these tend to degenerate into a battle between supposed experts on value and the judgment often represents a compromise money figure based on general impressions gained from widely divergent expert guesses.

Issues relating to the relevant market should not be decided in this fashion. Each market is different and the relevant business

facts are numerous and complex. There is no better way of presenting market evidence effectively to a judge than to develop the day-to-day buying and selling and to present the competitive pulls and tugs which exist through the testimony of men who know the business best. Fact rather than theory should control.

This leads to some general concluding comments about the role of economists in antitrust enforcement. The Sherman Act carries both civil and criminal sanctions. The tests which are developed for determining liability must therefore be tests which can be applied by District Courts with some degree of certainty and understanding. They must be tests which can be generally understood by the business community and sufficiently precise for submission to a treble damage or criminal jury. Thus the standards which are developed for determining the relevant market or the presence or absence of monopoly power over price, for example, must be standards which are susceptible to resolution through litigation. They must be standards which recognize the problems of proof, the probable availability of concrete evidence, and the other practical problems of litigation. If economic theory is permitted to become paramount in our approach to the practical problems of monopoly and restraint of trade there is a real danger that criteria will develop for ascertaining liability which are so erudite and complex that they are not conducive to solution by trial before an equity judge, much less a jury. The economist is not trained in the process of impartial fact finding and has little knowledge of the complex problems presented by the laws of evidence. He tends to give too much weight to a single phrase in an exhibit if it fits his major premise. He is apt to ignore the totality of the evidence and to consider the trial process cumbersome and cross-examination wasteful. He is more anxious to make the facts conform to his theory, than he is to let the facts speak for themselves.

Some of you have undoubtedly seen a proposal by a highly competent economist that problems of monopoly no longer be resolved through the time honored process of litigation. Judge Wyzanski's economic assistant in the *United Shoe Machinery* case has proposed that we do away with antitrust trials, oral testimony, cross-examination, and so forth, at least where monopoly is charged. He would have two or three trained economists in the employ of the Govern-

ment examine a company's records and produce a report. A group of company economists would then reply to this by another report. He would then ask that an expert commission—I assume he means by this another group of expert economists employed by the Government in a different capacity—evaluate the reports and reduce the entire result to a determination which would settle liability and propose appropriate relief.

The fundamental right of cross-examination and judgment by an independent judiciary cannot thus lightly be swept away, for under our system the independence of the judiciary was designed as a necessary bulwark against ill-considered economics or social theories not written into law. The suggestion will not be taken seriously, but it points up a trend toward administrative or other shortcut enforcement techniques which should be resisted. The theoretical economist can help formulate decrees, can be at the lawyer's side and assist by calling attention to relevant lines of inquiry, but he should not become the arbitrator of antitrust disputes.

If we continue to seek our solutions in the courtroom the practical problems incident to development of evidence and the practicalities of proof will be recognized and standards for the enforcement and interpretation of these laws will continue to have some reality. The courts, over a long period of time, have given content and meaning to our vague antitrust laws. Putting the Robinson-Patman Act to one side, certainly all practitioners in this field can in most cases now with considerable assurance advise a client as to whether he has stepped onto dangerous ground. This body of precedent, which admittedly does not resolve all possible issues, is nonetheless concrete and quite comprehensive. If we continue to litigate antitrust cases, particularly those where the Government is seeking to expand the influence or change the interpretation of a particular antitrust statute, we will, through the time vested processes of the equity courts, reach more competent and fairer decisions than if we place our destiny in the hands of the economists for their subjective decisions.

There is no valid reason why the economic and legal tests of monopoly should coalesce. The courts should not accept many of the economic tests for determining monopoly which are being offered. Mr. Sherman did not have such tests in mind and the validity of these theories is still unestablished. The courts will, it may be hoped, follow a more traditional and sensible route. They will look to the

practicalities of each situation in the light of everyday common-sense experience, recognizing that they are administering a statute which is both civil and criminal in its consequences. They will not permit themselves to be made administrators of the economy who attempt to dictate business judgments. Successful prosecutions in the monopoly field will occur only where predatory practices have been shown or where monopoly power can be demonstrated by an absence of substantial competition coupled with concrete evidence of its assertion. Those of us who advise business clients should not fear to encourage them to continue their research, to encourage them to continue to expand their productivity. We should urge them to be competitors and stand ready to defend them in court if they are challenged by the Government or anyone else merely because they are successful.

[illegible]

[illegible]

ECONOMIC TESTS OF MONOPOLY AND THE CONCEPT OF THE RELEVANT MARKET

by

George W. Stocking*

Section 2 of the Sherman Act prohibits monopolizing, attempting to monopolize, or conspiring to monopolize. Monopolizing involves acquiring a monopoly and is basically an economic concept. Trying to monopolize involves motives and is basically a psychological concept. Conspiring is a matter of the law. A balanced interpretation of the Sherman Act would seem to embrace three disciplines—economics, psychology, and the law. Fortunately judges, versatile by training and experience and self-reliant by disposition, have not felt the need of psychologists in applying the Sherman Act. Since motives have economic significance only as they reveal themselves in business conduct, there is indeed little reason for the courts to call in the psychologists in administering Section 2. Only recently have they felt the need of economists. Economists perhaps can do double duty. Surely they know something about monopoly, and they should have special competence in determining whether business conduct—that is, business practices—is competitive or monopolistic in character. In short, the economists' function with reference to Section 2 should be to determine whether a defendant has really obtained a monopoly. It is for the courts to decide whether he has monopolized within the meaning of the Sherman Act, because the law bans only monopolies that have been unlawfully acquired or maintained.

Even for economists, determining the existence of monopoly is difficult. It was perhaps simpler when we knew less about it. In the good old days before we had learned of the purity and perfection of competition, when monopoly was merely an ugly, blood-thirsty Moloch, it was easier to recognize. Today we know that pure monopoly is no less an abstraction than is pure competition and is rarely found in real markets. No market situation is apt to be entirely free from monopolistic restraints, and no monopolist can ignore the rivalry of substitutes.

---

* Professor of economics, Vanderbilt University.

Technical progress and mechanical ingenuity have so broadened markets and dimmed boundaries that among firms and products with previously isolated markets a vigorous rivalry has broken out. Aluminum was for many years a classic example of domestic monopoly. Today other materials are available for the uses it serves: copper for electrical cables and conductors, lead for tubes and cables, zinc, brass, and magnesium for alloys, steel for trucks, vans, and trailers, and wood, steel, and copper for construction. For the manufacture of cooking utensils aluminum meets the rivalry of glass, tin ware, stainless steel, cast iron, enamel ware, and copper. As uses for aluminum have multiplied, its exclusive domain has so diminished that today it has few markets in which it does not meet the rivalry of alternative materials. The same is true of most other products throughout industry. As firms have diversified their operations and broadened their product mix, they not only have intensified rivalry with each other but have created a rivalry within themselves by producing different products that serve the same general function.

These developments raise a challenging question for antitrust lawyers, economists, and the courts. Does rivalry among substitutes provide the protection to consumers contemplated by the antitrust statutes? Many people believe it does. Businessmen have noted these developments with pride, economists, with optimism. Businessmen have pointed to them as evidence not only of the virility of private enterprise but of the rejuvenation and intensification of competition. Economists in loftier language, more technical and abstruse, have seen in them a waning of oligopolistic power. Demand functions for any firm, we are told, have lost their dependable stability[1] and have acquired a commendable consumer-protecting cross-elasticity.

But the optimism of the economists has not been matched by their ability to agree on the extent of monopoly power in particular situations or on the weight that should be given to various factors in identifying and measuring it. Economists like judges cannot free themselves of all preconceptions. Depending on their point of view, they have been willing to use their tools either for defendants or for the government in antitrust cases. And in independent analysis of antitrust proceedings, when they must select significant facts from the

---

1 Robertson, "On the Changing Apparatus of Competition," 44 Am. Econ. Rev. 51, 52 *et seq.* (1954).

multitude of data spread over thousands of pages of testimony and exhibits, what they find may unwittingly be influenced by what they are looking for.

With this acknowledgment of the frailties that affect us, I shall endeavor to indicate as objectively as I can what I regard as proper criteria for determining monopoly and to show their significance to the *Cellophane* case.[2]

The Concept of Workable Competition

Economists, recognizing the imperfections of competition in the market place and the many and unique patterns into which it falls, have sought to differentiate the socially acceptable situation from the unacceptable by developing the concept of workable competition.[3] According to this concept, a market structure is workably competitive if it yields acceptable performance that cannot be improved without abandoning the market entirely as a regulator of economic activity. In determining workability economists look to three factors: industrial structure, business conduct, and economic performance. As my published work indicates,[4] I do not believe that the standard of workability is an appropriate one by which to determine the legality of business arrangements under the antitrust statutes. The least

---

[2] *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

[3] Clark, "Toward a Concept of Workable Competition," 30 Am. Econ. Rev. 241 (1940); Wilcox, *Competition and Monopoly in American Industry* 8-9 (TNEC Monograph No. 21, 1940); Stigler, "The Extent and Bases of Monopoly," 32 Am. Econ. Rev. (No. 2 Supp., Pt. 2) 2-3 (1942); Adelman, "Effective Competition and the Antitrust Laws," 61 Harv. L. Rev. 1289 (1948); Edwards, *Maintaining Competition* 9-10 (1949); Mason, "The Current Status of the Monopoly Problem in the United States," 62 Harv. L. Rev. 1265 (1949); Bain, "Workable Competition in Oligopoly," 40 Am. Econ. Rev. 35 (Supp. 1950); Markham, "An Alternative Approach to the Concept of Workable Competition," 40 Am. Econ. Rev. 349 (1950).

[4] Stocking and Watkins, *Monopoly and Free Enterprise* 92-109 (1951); Stocking, "The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities," 21 U. Chi. L. Rev. 527, 617-19 (1954); Stocking, "The Rule of Reason, Workable Competition, and Monopoly," 64 Yale L.J. 1107, 1161-62 (1955); Stocking, "The Attorney General's Committee's Report: the Businessman's Guide Through Antitrust," 44 Georgetown L.J. 1, 23-24 (1955); Stocking, "On the Concept of Workable Competition as an Antitrust Guide," 2 Antitrust Bulletin 3 (1956).

acceptable of these criteria is performance. Bad performance may be an appropriate criterion for determining public policy towards a competitive industry,[5] but good performance can scarcely justify private monopolies in a society dedicated to free enterprise. As Ben W. Lewis has expressed it,

> Results alone throw no light on the really significant question: have these results been *compelled* by the system—by *competition*—or do they represent simply the dispensations of managements which, with a wide latitude of policy choices at their disposal, happened for the moment to be benevolent or "smart"? This points up the real issue.[6]

Although I do not regard the principle of workability as an acceptable guide in antitrust cases, I do believe that the criteria that economists have developed for determining workability—structure, conduct, and performance—can serve a useful, perhaps indispensable, function in determining the existence of monopoly.

Industrial Structure and the Relevant Market

In examining industrial structure one looks to the number of firms in an industry, their relative size, the extent to which a few dominate it, ease of entry, availability of substitutes, and similar characteristics that have relevance to economic behavior. Some economists have contended that structure does not have a definitive relationship to behavior. M. A. Adelman, for example, has argued that competition can be effective with only a few large firms in an industry, with many small firms, or with a mixture of large and small firms.[7] This may be true, but most economists would probably admit that the fewer the firms in an industry the greater the likelihood of their following common pricing policies and common business practices calculated to maximize their earnings; in short, the greater the

---

[5] For example, the waste that accompanies unrestricted competition in producing oil justifies regulation to assure its production in a manner consistent with the geological units in which it occurs.

[6] Lewis, "The Effectiveness of the Federal Antitrust Laws: A Symposium," Keezer, organizer, 39 Am. Econ. Rev. 689, 707 (1949). (Emphasis in the original.)

[7] Adelman, "Effective Competition and the Antitrust Laws," 61 Harv. L. Rev. 1289, 1303 (1948).

likelihood of their behaving like monopolists. In truth, structure may dictate behavior. Despite the vogue that the Chamberlinian theory of oligopolistic pricing[8] attained shortly after its enunciation,[9] economists generally would probably now accept the proposition that without tacit agreement oligopolists are as likely to behave like competitors as like monopolists. Uncertainties, as Chamberlin pointed out, may make the outcome indeterminate.[10] What is certain is that some structural patterns are more conducive to tacit agreement than others. When only a few sellers dominate a market they need no formal agreement to insure their acting in a way to promote their mutual interests. And they can readily find pricing devices—basing point pricing, price leadership and the like—that will insure their doing so.

Students of industrial structure who emphasize the role that substitutes play in determining the effectiveness of competition believe that the relevant market for any product may be broader than that of the firms producing it. Ross M. Robertson, an able exponent of this view, has declared,

> To assess the competitive situation of a firm we must still resort to counting. . . . Yet counting only those firms which are within the "industry" tells us very little. We must do our counting by taking categories of uses for the output of an industry, considering what products of other industries directly compete within these categories.[11]

But if counting substitutes is to have any real significance, some method of calculating the substitutability of the so-called substitutes is required. All products compete with each other for the consumer's dollar, and in this sense each product is a substitute for any other. Substitutes regarded in this light have no significance to the monopoly problem. To have meaning they must be close enough to insure an economical

---

8 Chamberlin, *The Theory of Monopolistic Competition* (1933).

9 "For the historian of economic thought, the most revolutionary feature of monopolistic competition theories will probably be the unprecedented pace at which they conquered their audience. . . . five years had not elapsed before textbooks were revised, one after another, in order to insert one or two chapters on the new theory." Triffin, *Monopolistic Competition and General Equilibrium Theory* 17 (1940).

10 Chamberlin, *op. cit. supra* note 8, 2d ed. (1936) at 51-53.

11 Robertson, *supra* note 1, at 53-54.

allocation of resources and to protect consumers from exploitation. Economists have developed the concept of cross-elasticity to measure substitutability, and the courts have borrowed it in trying to determine a product's relevant market. For reasons I shall make clear later, I believe this concept alone cannot be of much use in antitrust cases and that its use by those not trained in economics will lessen the effectiveness of Section 2 of the Sherman Act.

Business Conduct and the Relevant Market

Conduct or business strategy may be not only designed to insure common policies among business rivals but may be used by a single firm to protect some advantage—that is, some monopoly power—that it possesses. Some economists, notably Joseph A. Schumpeter, have argued that temporary monopolistic advantages are essential to economic progress.[12] Every innovation represents a monopoly and if it meets with popular acceptance is likely to bring to the innovator, for a time at least, monopoly profits. Without the promise of such profits, Schumpeter argues, innovations would cease and progress would be stifled. But while Schumpeter would apply a performance test to the acceptability of monopoly, he would not deny that the innovator possesses monopoly power.

This country's patent policy was based on the Schumpeterian theory long before Schumpeter advanced it. That business firms acquire patents is indicative of their belief that the patented process or product has unique qualities that so differentiate it from rival processes or products as to enable the possessor to make gains greater than he could make if everyone were free to use it. Patents may legalize monopoly power, but that they create it can scarcely be denied. Other forms of business strategy designed to give a business firm power in the market do not enjoy legal status, but they similarly reflect an effort to isolate firms from the unrestrained competition of their rivals. Dividing territories, setting market quotas, and the like are devices of the monopolist or of the would-be-monopolist. That businessmen resort to such devices makes them suspect under both Section 1 and Section 2 of the Sherman Act. When they do, both the economists and the courts may find their task simplified.

---

12 Schumpeter, *Capitalism, Socialism, and Democracy* 89-90 (1942).

Where monopolistic strategies are entirely lacking, it may be necessary to determine the precise boundary of a seller's market as a step in determining whether he has monopoly power. But when business strategy provides the answer to the question whether a firm has monopoly power, the difficult task of determining the boundaries of the relevant market may be avoided. Businessmen do not try to protect a position that has no value. When they act with respect to their position as though they believe it possesses elements of monopoly, this is persuasive evidence that it does. Business conduct, in short, can be a significant factor in determining the existence of monopoly.

Business Performance

Judges may regard business conduct as a slender reed on which to hand the determination of antitrust violation. But rarely will they have to rely on it alone. Business performance may so reinforce a judgment on structure and conduct as to leave little doubt that a firm in fact has power over the market. The economist's interest here is not whether a firm with monopoly power serves society well, but whether a firm has monopoly power. The aspects of performance most relevant to determining whether a firm possesses monopoly power are its pricing policy and its profits record. The courts have defined monopoly power as the power to exclude competitors and the power to control price.[13] In doing so they doubtless have been influenced by economists. At any rate, economists will not take exception to their definition although they might suggest a narrowing of it to the single concept, the power to control price, since the power to exclude competitors will reflect itself in the power to control price.

To distinguish competitive pricing from monopolistic pricing is not always easy. In a perfectly competitive market rivals will sell at identical prices at any moment of time, but prices will change frequently in response to changing consumer wants and consumer evaluations of the relative importance of different products and in response to changing conditions of supply. In a market of pure monopoly, prices will similarly change in response to changes in consumer evaluations and in response to changes in cost. The difference is that in competitive markets the average cost of production (including a nor-

[13] *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948); *United States* v. *Griffith,* 334 U.S. 100 (1948); *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946).

mal rate of return on investment) sets the limit to long-run price, while in a monopolized market the monopolist continuously re-evaluates demand and cost functions and tries to so adjust output as to maximize earnings by keeping price above cost. The greater the power of a monopolist the greater the likelihood that his prices will be flexible. The limitations on monopoly power in most industrial markets are such that noncompetitive or quasi-monopolistic pricing is apt to result in identical pricing by business rivals, with prices stable over a long period. In short, the closer markets are to perfect competition or to perfect monopoly the greater the similarity in their price behavior.

The characteristics that distinguish monopolistic from competitive markets where both have flexible prices are their cost-price ratios and their rate of earnings. In competitive markets prices tend to equal costs—marginal in the short run, average in the long run. In monopolistic markets prices tend to exceed marginal costs in the short run and average costs in the long run. The excess shows up in abnormal, that is, noncompetitive profits. Because economists rarely have access to cost data they may be forced to rely on profits data in determining the existence of monopoly. Pure profits of course are not confined to monopolistic markets. Competitors who respond to a rapidly expanding demand may realize earnings in excess of normal competitive rates. That they do so reflects the frictions that retard shifts in the use of resources. But such earning rates are apt to be short-lived. Long-term profits rates may be an aid in determining the existence of monopoly.

Economic Tests of Monopoly and the Cellophane Case[14]

Let us now examine the *Cellophane* case in the light of the several criteria for determining the existence of monopoly outlined above—structure, conduct, and performance. My task is to answer the first of the two questions[15] set by Judge Leahy in the district court: Does Du

---

14 For a more complete discussion of this topic see Stocking and Mueller, "The Cellophane Case and the New Competition," 45 Am. Econ. Rev. 29 (1955), which documents fully the statements of fact given here in abbreviated form.

15 "The charge here is duPont monopolizes cellophane. The charge involves two questions: 1. does duPont possess monopoly powers; and 2., if so, has it achieved such powers by 'monopolizing' within the meaning of the Act and under United

Pont have a monopoly in making and selling cellophane? The second question, whether Du Pont has monopolized within the meaning of Section 2 of the Sherman Act, is a proper one for the courts to have determined.

Structure

Only two domestic firms made and sold cellophane in the domestic market when the Government filed its antitrust case in 1947—Sylvania Industrial Corporation of America and the Du Pont Company, and Du Pont accounted for over three-fourths of domestic sales. The structure of the industry was clearly not conducive to effective competition in selling cellophane if cellophane be considered a differentiated product. But is not cellophane's relevant market determined by the products that serve a similar function? Judge Leahy concluded that it was. In doing so he decided, and the Supreme Court sustained him, that cellophane was not a unique product, that in most of its end uses it met the competition of other wrapping papers, and hence that its relevant market was that for flexible wrapping materials. Of this broader market De Pont obviously had no monopoly. In food packaging, for which Du Pont sold 80 per cent of its cellophane output, its percentage of total sales of cellophane, aluminum foil, glassine, waxed and other specialty wrapping papers, and films by nineteen major converters in 1949 varied from 6.8 per cent in bakery products to 47.2 per cent for wrapping fresh produce. For every important food except fresh produce, foil, glassine, and waxed and other specialty papers outsold cellophane.[16] In finding that these several flexible wrapping materials gave vigorous competition to cellophane Judge Leahy noted that shifts in business between cellophane and other materials were "frequent, continuing and contested." [17] From this the district court and the Supreme Court concluded that cross-elasticity was high. By delimiting cellophane's market according to the areas in which it met the rivalry of substitute products and by applying the concept of cross-elasticity, this decision brings the law

States v. Aluminum Company of America, 2 Cir., 148 F. 2d 416, 429. Unless the first is decided against defendant, the second is not reached." *United States* v. *E. I. du Pont de Nemours & Co.,* 118 F. Supp. 41, 54 (D. Del. 1953).

16 See tables, *id.* at 113 (reproduced in *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 407-9 (1956)).

17 *Id.* at 91.

into harmony with recent concepts of competition. Nevertheless I find the courts' analysis and their conclusions unsound. As I have indicated, I do not believe the concept of cross-elasticity is of much use in determining whether a firm has a monopoly. In the first place, it calls for more precise information than antitrust cases can be expected to provide. Cross-elasticity defines the extent to which a change in the price of one commodity, for example, A, affects the sales of another commodity, B. If a decrease in the price of A diminishes the sales of B, cross-elasticity is positive. All that this tells us is that one product can be substituted for another, and that some consumers will make the substitution if their evaluation of the two products warrants it. If a given percentage change in the price of one product causes a relatively large change in the sales of the other product, cross-elasticity is high. On this question the record in the ***Cellophane*** case is necessarily silent; to answer it would involve disclosure of confidential information by business rivals. In the second place, even if the data were available, positive cross-elasticity, alone may not warrant the conclusion that the seller of neither product can be a monopolist. To determine the existence of monopoly power economists and the courts must examine both the price response of the firms losing business and the cost-price relationships of firms selling both products. If a price decrease by a firm selling product A shifts business from B to A, firms selling B must reconsider their pricing policies. To recapture lost business or, where cross-elasticity is high, to prevent the loss of what they have, they must lower their prices. If price changes by producers of one commodity are unaccompanied by price changes in the rival commodity, this indicates a lack of competition between the two commodities. Either the loss of business is too slight to matter—the cross-elasticity is low—or the firm cutting prices has a monopoly advantage not possessed by those not cutting prices. The firms not cutting prices must already be selling their product at a price equal to their marginal cost, while the firm that cut may have been getting a price in excess of its marginal cost.

So much for the principles. What are the facts? Between 1924 and 1938 Du Pont through a series of price cuts reduced the average price of cellophane by over 80 per cent. During this same period the average prices of glassine and waxed paper remained virtually constant. Between 1938 and 1940 Du Pont decreased the price of cello-

phane a further 8.6 per cent, while the prices of glassine and waxed paper actually increased.[18] Obviously the cross-elasticity of demand was very low. In selling cellophane Du Pont was able to ignore the prices of rival wrapping papers. Between 1924 and 1950, as Du Pont dropped its average prices of cellophane from $2.51 to 49 cents a pound, prices for the principal type of moistureproof cellophane were from two to seven times the price of 25# bleached glassine and from two to four and one-half times the price of 30# waxed paper.[19] That Du Pont could continuously sell cellophane in so-called competition with glassine and waxed paper, never charging less than twice as much, is sufficient evidence that cellophane was a unique product. As the Supreme Court dissenting opinion put it,

> We cannot believe that . . . practical businessmen would have bought cellophane in increasing amounts over a quarter of a century if close substitutes were available at from one-seventh to one-half cellophane's price. That they did so is testimony to cellophane's distinctiveness.[20]

That marginal buyers, candymakers, for example, shifted their purchases from one product to another from time to time does not indicate that Du Pont had no monopoly in selling cellophane. No monopolized product is completely isolated from rival products, and consumers anxious to get their money's worth are constantly comparing values and shifting purchases. They are not dissuaded from doing so merely because one of the products they desire is sold by a monopolist and another by competitors.

Conduct

Du Pont officials themselves are on record as believing that they had in cellophane a unique product for which there was no effective

---

[18] Table of annual average cellophane prices from 1924 to 1950, *id.* at 82. Price comparisons between cellophane and other wrapping materials appear in Defendant's Exhibit 994-A.

[19] Defendant's Brief on the Facts and the Law, Appendix A (graph based on prices per 1,000 sq. in.), *United States* v. *E. I. du Pont de Nemours,* 118 F. Supp. 41 (D. Del. 1953).

[20] *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 417 (1956).

substitute,[21] and they adopted a strategy to protect Du Pont's monopoly. Du Pont entered the business in 1923 by joining with La Cellophane, a French company that owned the original patents, to form the Du Pont Cellophane Company, which acquired the exclusive right to exploit the patents in the American market. In 1929 Du Pont Cellophane Company entered into a patent exchange agreement with Kalle & Company of Germany, and in 1935 it entered into one with British Cellophane, Ltd. In effect these agreements were also divisions of territory. While not signers of the 1930 cartel agreement dividing world markets, Du Pont representatives attended the Paris cartel conference, and Du Pont Cellophane Company later relied on the cartel agreement to protect its claim to the West Indies market. It took steps to obtain tariff protection that eventually excluded virtually all imports of cellophane. It settled its patent-infringement suit against Sylvania by a patent exchange and cross-

[21] In 1923, when Du Pont was considering entry into cellophane production, its development department made a comparative survey of glassine, sheet gelatin, and tin foil, cellophane's closest rival products, and concluded that they offered no serious competition because of price or quality differences. Government's Exhibit 392, pp. 5437-38, *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953). Twenty-five years later Du Pont still believed that serious rivals had not appeared. Its 1948 market analysis of cellophane concluded: "The principal markets for non-viscose films have been competitive with Cellophane only to a very minor degree up to this time. Some are used very little or not at all in the packaging field—others are employed principally for specialty uses where Cellophane is not well adapted—none have been successfully introduced into any of Cellophane's main markets due to their inherent shortcomings." Defendant's Exhibit 595, p. 1147, *ibid.* Olin Industries, Inc., a company that Du Pont in 1948 decided to encourage to enter cellophane production (and that did so in 1951), after investigation reported: "According to du Pont, Cellophane is considered the only all purpose film, and any product to be truly competitive with Cellophane must have the following attributes: (1) low cost, (2) transparency, (3) operate with a high efficiency on mechanical equipment, (4) print well both as to speed and appearance. There are no films currently marketed which are potentially competitive to any substantial degree in Cellophane's major markets when measured by the above attributes necessary for wide usage. Other transparent films will find their place for those low volume uses which can absorb the additional cost of the film and which necessitate certain physical properties not possessed by Cellophane." Report on "the evidence in support of entry by Olin Industries into the Cellophane business, based on the purchase of patent license and 'know-how' from du Pont," December 15, 1948, Government's Exhibit 566, p. 7575, *ibid.* A Du Pont survey of competitive conditions in 1950 made no reference to glassine, waxed paper, or sulphite paper but said, "Competition for du Pont cellophane will come from competitive cellophane and from non-cellophane films made by us or by others." Record, p. 4070, *ibid.*

licensing agreement that geared Sylvania's production to its own. It launched a research and patent-accumulation program that, according to President Yerkes, was designed as a defense measure to protect "the field of moistureproofing agents other than waxes." [22] By these steps it forestalled genuine competition in selling cellophane in the American market. Its strategy was that of a monopolist.

Performance

The district court found Du Pont to be an aggressive and progressive competitor of all flexible packaging material producers, quick to improve its product and processes, quick to lower its prices, and quick to promote its sales by acquainting potential users with cellophane's superior qualities. In the broad market for flexible wrapping materials Judge Leahy found a vigorous and healthy competition, and for its farsighted, aggressive management in meeting this competition he thought Du Pont deserved praise, not censure. From the same record I find that Du Pont behaved as any intelligent monopolist might have behaved. Through research and experience it improved the quality of its product and the processes for making it. It was continuously alert to the market potentialities of cellophane, and it took aggressive steps to acquaint potential users with its peculiar qualities. Its management periodically re-examined its costs and sales, actual and potential, and shaped its price and production program to improve its earnings. In doing so, as I have indicated, it was able to ignore the pricing policies of producers of rival wrapping materials. Du Pont officials recognized that they had control over cellophane prices, and the record shows they used it to achieve specified profit goals. In May 1948, with earnings on investment in cellophane averaging 31 per cent before taxes, a division manager suggested that if such earnings were considered inadequate Du Pont should raise its prices; and he proposed a schedule of prices calculated to yield 40 per cent.[23] After adoption of the schedule Du Pont's earnings rate increased to 35.2 per cent in 1949 and to 45.3 per cent in 1950.[24] An intracompany memorandum indicates that in considering

[22] December 1933 report to Du Pont Cellophane's board of directors, January 22, 1934, Government's Exhibit 488, p. 6478, *ibid.*

[23] Government's Exhibit 591, p. 7539, *ibid.*

[24] Calculated from annual profit and loss statements of the cellophane division of the Du Pont Company. See Stocking and Mueller, *supra* note 14, at 59.

a price increase during the postwar inflation Du Pont was more concerned about its effect on public relations than on rivals or customers. Du Pont's pricing policies were clearly those of a monopolist.

Du Pont's earnings were likewise monopolistic. Its annual rate of earnings on investment, before taxes, in cellophane ranged from 18.0 per cent to 62.4 per cent and averaged 35.6 per cent during the period 1925 to 1938. Du Pont's earnings on its investment in rayon during the same period ranged from -0.9 per cent to 34.2 per cent and averaged only 12.9 per cent. During the nine years from 1930 to 1938 inclusive, when competition had become vigorous, earnings on rayon averaged only 6.6 per cent.[25] This comparison has unique significance. Cellophane and rayon stem from the same basic raw materials. Both were innovations appearing about the same time. Both were initially manufactured under noncompetitive conditions and both enjoyed substantial tariff protection. Du Pont produced both. Both have reasonably close substitutes. As output increased both were the beneficiaries of continuing improvements in production, a rapid reduction in costs, and a rapid decline in price. The significant difference in making and selling the two products is the structure of the two industries. Both began as monopolies, but in rayon rival producers quickly appeared. By 1930 American Viscose Corporation, the country's first producer, and Du Pont, its second, met the rivalry of eighteen other rayon makers. This intensification of competition eventually resulted in competitive pricing and the disappearance of monopoly earnings.

The basic issue in the *Cellophane* case really boils down to this: Would freedom of entry have brought in a larger number of cellophane producers and ultimately lower prices and earnings than have prevailed? I believe it would have. Moreover, if the rivalry of substitute packaging materials, particularly glassine and waxed paper, had in fact forced competitive pricing on Du Pont, as the court concluded, Du Pont should have been indifferent to the entry of rival cellophane producers. Competition from either cellophane or waxed paper would have resulted in precisely the same cost-price ratios in selling cellophane. As judged by structure, conduct, and performance, Judge Leahy erred in giving a negative answer to

---

25 Calculated from table prepared by Stocking and Mueller, *id.* at 62.

his first question: Does Du Pont have a monopoly in making and selling cellophane?

What can be said about the broader significance of the Supreme Court's opinion affirming Judge Leahy's decision? If it becomes a precedent, the Supreme Court minority is right in declaring that the Court has emasculated Section 2 of the Sherman Act. If cellophane is merely a flexible wrapping material, then airlines, railways, bus lines, and river steamers are merely transportation facilities; aluminum, copper, brass, and steel are merely metals; and cotton rugs, linen rugs, nylon rugs, woolen rugs, linoleum, and similar substitutes are merely floor coverings. Under the Supreme Court's *Cellophane* ruling a monopoly in any one of them need not violate Section 2 of the Sherman Act, and in denying the existence of monopoly the courts need only ascertain that people choose among alternative products serving similar functions in trying to get their money's worth.

This conclusion on the significance of the decision is unlikely to disturb the exponents of the new competition, because they believe that neither the courts nor Congress need worry about monopoly. They need not worry, because according to this view, "there is probably not much of it." [26] Despite the dramatic changes in industrial structure that the last sixty years have seen, the exponents of the new competition by a resort to loose counting have brought us back to the neoclassical economics of large numbers. This return to a pseudo-nineteenth-century economics should bring comfort to business executives anxious not to transgress the vague and shifting boundary that in antitrust decisions separates a public service from a criminal offense. Although the invisible hand now guides through a more complicated industrial maze, we are told that it still guides to promote the public welfare. Indeed, all things work together for good to them that love God.

[26] Robertson, *supra* note 1, at 61.

REPORT OF THE SECTION ON ANTITRUST LAW OF THE ILLINOIS STATE BAR ASSOCIATION

In the matter of: Senate Bill 11
(Kefauver)

House Bill 11
(Patman)

85th Congress, First Session

The Antitrust Section of the Illinois State Bar Association respectfully submits this report in opposition to the enactment of the above described companion bills now pending before the Congress of the United States. The bills would amend Section 2(b) of the Robinson-Patman Act in connection with the existing right of a seller to meet, in good faith, the equally low price of a competitor.

The Committee opposes H.R. 11 because it would completely eliminate the existing right to meet competition and, S. 11, because it would eliminate this right for all but delivered-price sellers. Since the right to meet competition is essential to a competitive economy, both bills run contrary to the basic objectives of the antitrust laws. Nor are the bills necessary to effective enforcement of the Robinson-Patman Act.

The text of H.R. 11 and S. 11 are set forth in the appendix hereto.

The Applicable Statutes

Section 2(a) of the Robinson-Patman Act prohibits a seller from discriminating in price between his customers when such discrimination may have certain detrimental effects on competition. Section 2(b), among other things, permits a seller to quote a lower price in order to meet in good faith an equally low price quoted by a competitor.

Background of the Proposed Amendment

The leading case on the meeting competition defense is *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951). The Supreme Court there held that Section 2(b) provides the seller with an absolute defense to a charge of price discrimination, rejecting the

Federal Trade Commission's argument that the defense merely served to rebut a *prima facie* case of violation made by a showing of price differences alone. The Commission's contention, rejected by the Supreme Court, was that the meeting competition defense should be unavailable when the price differences had an adverse competitive effect. The Court said, "So interpreted the proviso would have such little, if any, applicability as to be practically meaningless."

Although the result of the *Standard Oil* decision has been supported by the Justice Department,[1] the Administration,[2] and, from time to time, by the Federal Trade Commission[3] itself, legislation to remove or at least to modify the meeting competition defense has been introduced in each Congress since 1949. H.R. 11 and S. 11 are substantially similar to their predecessors.

Effect of the Proposed Amendments

The proposed amendments would clearly limit the availability of the meeting competition defense. Whether the defense would survive at all, and, if so, under what conditions, is a matter of dispute. Some legal commentators believe that the defense would be completely unavailable for all practical purposes,[4] a view shared by this Committee.

Price differences are forbidden by Section 2(a) of the Clayton Act, only where the effect of the differences may be (1) "substantially to lessen competition or tend to create a monopoly in any line of commerce, or (2) to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

H.R. 11 and S. 11 purport to make the meeting competition defense available, if at all, when the court finds that the effect of

[1] Hearings before Antitrust Subcommittee of the Senate Judiciary Committee on H.R. 1840 and other bills, 84th Cong., 2d Sess. (p. 688 *et seq.*).

[2] Hearings before Antitrust Subcommittee of the Senate Judiciary Committee on H.R. 1840 and other bills, 84th Cong., 2d Sess. (p. 24); Cong. Rec., June 22, 1954, p. 8108; Cong. Rec., July 6, 1949, p. 9164.

[3] Senate hearings on S. 1008, 81st Cong., p. 72.

[4] Statement of Jerrald G. Van Cise for Clayton Act Committee, New York State Bar Association, Hearings before Antitrust Subcommittee of the Senate Judiciary Committee on H.R. 1840 and other bills, 84th Cong., 2d Sess. (p. 414); statement of Chicago Bar Association, *id.*, p. 508.

the discrimination might be to "injure, destroy or prevent competition with any person" but not "substantially to lessen competition or tend to create a monopoly in any line of commerce."

No clear illustrations have been given of a situation in which such circumstances would prevail. The House Committee Report on an identical predecessor to H.R. 11 states that the good faith defense is to be applicable when the injury is "only to an individual competitor, but is not of sufficient effect that it may result in injury to the vigor of competition." However, the Report also states that proof of injury to an individual competitor would not preclude a finding that the effect of the injury was to substantially lessen competition or tend to create a monopoly "in appropriate cases." [5]

Nor do the cases provide guides. The courts and the Federal Trade Commission have thus far made no distinction between the several competitive effects contained in Section 2(a), and in fact, have tended to equate them. An example is ***Moore* v. *Mead's Fine Bread Co.,*** 348 U.S. 115 (1954).

The past failure to differentiate between the competitive effects proscribed in Section 2(a) of the Act would make it extremely difficult to establish degrees of competitive injury in the future. Price differences having minimal or nonexistent effects upon either the vigor of competition generally or upon individual competitors have been held to violate the Act. A case in point is ***Federal Trade Commission* v. *Morton Salt Co.,*** 334 U.S. 37 (1948), in which a small difference between carload and less than carload prices for salt, available to 99.9 per cent of the seller's grocer customers, was held to have a "reasonable possibility" of "lessening competition" among grocers.[6] To find some still lesser effect upon competition which could be labeled "injury, destruction or prevention of competition" would seem virtually impossible.

If there is no feasible distinction between the adverse competitive effects set forth in Section 2(a) of the Act, there is no doubt that H.R. 11 and S. 11 would nullify the meeting competition de-

---

[5] H.R. Rep. No. 2202, 84th Cong., 2d Sess. (1956).

[6] See also *Samuel H. Moss, Inc.*, 36 F.T.C. 640 (1943), *aff'd*, 148 F. 2d 378 (2d Cir. 1945), *cert. denied*, 326 U.S. 734 (1945), in which it was held that lower prices given a few buyers "lessened competition" solely by inducing such buyers to purchase from the seller rather than from other manufacturers.

fense. In the absence of any adverse effect upon competition, price discrimination does not violate the law. Yet the bills would permit the defense to be invoked only in the absence of such effect.

Since the courts have attempted no such distinction and, in fact, a rational distinction could hardly be made, it would appear impossible for a businessman to forecast the legality or illegality of a lower price given to a customer to meet a competitor's offer. It would be no less difficult for his attorney to advise him in such a situation. Even should the meeting competition defense survive, it would do so under circumstances which would make it so difficult of application as to render it practically useless.

The Economic Value of the Meeting Competition Defense

No valid antitrust purpose can be served by eliminating from the Robinson-Patman Act the right of a seller to charge different prices where it is necessary to do so in order to meet the equally low price of a competitor. On the contrary, the defense is basic to price competition and its elimination would directly contradict the basic philosophy of the Sherman Act.

It is important to understand precisely what this defense permits and what it does not. The meeting competition defense permits a seller to defend himself against competitive attack. If there were no such defense and a seller learned that one of his best customers had been offered a lower price by a competitor, he would have the unappetizing choice of letting the customer go or cutting prices to all of his customers to the same extent. This alternative could be particularly disastrous to small local concerns to whom a single good customer means far more than to large, nation-wide sellers.

The meeting competition defense permits sellers to reach out into distant markets to compete with more advantageously located sellers by absorbing freight or some other cost. This practice is socially valuable for it increases the territory in which each seller can compete and thus increases the number of sellers available in every market. H.R. 11 would completely destroy this practice; S. 11 would destroy it for all but delivered-price sellers.

The meeting competition defense does *not* permit a seller to engage in predatory price raids. The customer to whom a lower price is offered must already have received an equally low offer for

the defense to be available. This means that the customer is going to get the lower price in any event. The meeting competition defense does not create the lower price; it merely allows a second seller to compete.

The effect of H.R. 11 and S. 11, therefore, would not be to preserve competition but to inhibit it. Many sellers may be forced to withdraw from geographically distant markets, many will be forced to let customers go without attempting to meet competitive prices.

Freight Absorption

The practice of absorbing freight, when it results in one buyer paying less than another, is legal only so long as a good-faith-meeting-of-competition defense exists. Since H.R. 11 in effect destroys that defense, it also destroys the right of sellers to reach distant markets and compete with sellers more advantageously located through the mechanism of absorbing freight charges.

The Senate bill, S. 11, attempts to avoid this patently undesirable result by adding a proviso: "*provided further* that nothing contained herein shall be construed to alter the law applicable to the absorption of freight or of shipping charges." At first glance, this proviso may seem to cure the objectionable characteristics of H.R. 11, but consideration reveals that the proviso creates further discrimination.

Under S. 11's freight absorption proviso every seller who sells at a delivered price might be entitled to discriminate in price up to the full amount of the freight and shipping charges when necessary to do so to meet competition. But sellers who sell f.o.b. seller's place of business would have no freight or shipping charges to absorb. Since almost any price differential is regarded as tending to lessen competition, such sellers could rarely lower a price to meet the equally low price of a competitor. Yet the economic effect of price differentials is no different where the seller pays it. Thus S. 11 itself creates the grossest kind of discrimination between sellers.

The presence of the freight absorption proviso in S. 11 casts further doubt upon the merits of the bill as a whole. Why should the good faith meeting of the equally low price of a competitor be a good thing when it can be accomplished through freight absorption and a bad thing when it cannot? The distinction between ab-

sorbing freight and absorbing some other charge is purely nominal. Both reduce the price to the buyer and the return to the seller.

The proviso creates additional complex problems of definition. While its text refers to absorption of freight and shipping charges, sellers quote prices in a variety of ways that may include elements of transportation. For example, single basing-point, multiple-basing point, freight equalization, and zone pricing methods all reflect a seller's competitive price reductions in various degrees. But under the text of the proviso, it is not clear just which of these pricing techniques is covered. Thus novel and troublesome legal problems would attend all efforts to determine a seller's entitlement to the benefits of the proviso.

Respectfully submitted,

THE SECTION ON ANTITRUST LAW

APPENDIX

H.R. 11

H.R. 11, if adopted, would amend Section 2(b) to read as follows: (The matter proposed to be stricken is enclosed in brackets, and new matter proposed to be added is italicized.)

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price of services of facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* [that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing] *That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country it shall be a complete defense for a seller to show* that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

S. 11

S. 11, if adopted, would amend Section 2(b) to read as quoted immediately above in connection with H.R. 11, with the following proviso added as the last portion thereof: *"provided, further,* that nothing contained herein shall be construed to alter the law applicable to the absorption of freight or of shipping charges."